SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE PETITION OF U. S. JOINS, FOR A WRIT OF CERTIORARI AND WRIT OF PROHIBITION AGAINST THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT, AND JUDGES AND CLERK THEREOF.

MOTION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States, and the Court:

And now comes U. S. Joins, and, upon the showing made by the accompanying petition for a writ of *certiorari* and for a writ of *prohibition* against the Choctaw and Chickasaw Citizenship Court, and each of the judges and the clerk thereof, wherein he shows that on the 8th day of March, 1898, in the United States Court for the Southern District of the Indian Territory, and at a regular term thereof, and upon appeal from the Commission of the United States to the Five Civilized Tribes of Indians, (known as the Dawes Commission), and in cause pending on the docket of said Court entitled and styled U. S. Joins *versus* Chickasaw Nation, he recovered judgment final against said Nation identifying and establishing the citizenship of said Joins as a member by blood of the Chickasaw Nation or tribe of Indians, and wherein he shows that the said Choctaw and Chickasaw Citizenship Court, on the 17th day of December, 1902, without authority of law and without jurisdiction or power so to do, and in violation of the Constitution of the United States, did make and cause to be entered a decree, whereby and by reason whereof

and without notice to petitioner, the said judgment of the United States Court for the Southern District of the Indian Territory, in favor of your petitioner, by the terms of said decree of said Citizenship Court was cancelled, set aside and held for naught; and wherein it is shown that the said decree of said Citizenship Court cannot be reviewed by appeal or writ of error; and wherein it is shown, as a result of said decree of said Citizenship Court the petitioner has been deprived of the right to have his name enrolled as a member of the tribe of Chickasaw Indians, and has been deprived of valuable property rights; and the said U. S. Joins does now present this his motion to your honorable Court that he be granted leave to file herein the accompanying petition for the writ of *prohibition*, and the writ of *certiorari*, and that the said writs issue, as in said petition prayed for, and that he have such other relief as to your honorable Court may seem just and in accordance with the requirements of the law.

Wherefore, the said U. S. Joins respectfully prays your honorable Court that an order be made granting this motion and directing the issuance of the writ of *prohibition*, as prayed for in the said petition; also, that your honorable Court direct the issuance of a writ of *certiorari* to bring up the record referred to in said petition, that the said record may be considered upon the said petition.

WM. I. CRUCE AND
CALVIN L. HERBERT,
Attorneys and Counsel for the said Petitioner, U. S. Joins.

[Endorsed:] Supreme Court of the United States of America, in the matter of the petition of U. S. Joins for a writ of *prohibition*. Motion for leave to file petition for writ of *prohibition*, and for *certiorari*. William I. Cruce and Calvin L. Herbert, Attorneys for Petitioner, U. S. Joins.

In the Supreme Court of the United States.

IN THE MATTER OF THE PETITION OF U. S. JOINS FOR A WRIT OF CERTIORARI AND WRIT OF PROHIBITION AGAINST THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

PETITION FOR WRIT OF CERTIORARI AND WRIT OF PROHIBITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America, and to the Court:

Now comes U. S. Joins, the petitioner herein, and complaining against the Hon. Spencer B. Adams, Chief Judge, and the Hon. Walter L. Weaver, Associate Judge, and the Hon. Henry S. Foote, Associate Judge, of the Choctaw and Chickasaw Citizenship Court, and most respectfully represents and shows to this honorable Court—

1st. That on the tenth day of June, 1896, the Congress of the United States enacted a law conferring upon the Commission of the United States to the Five Civilized Tribes of Indians the right and power to entertain applications of all those claiming to be members of said tribes and to pass upon and settle the same.

See U. S. Statutes, 1 Sess., 54 Cong., 1895–6, page 339.

That said Act, as aforesaid, in part reads as follows:

"The said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any

of said nations, and after such hearing they shall determine the right of such applicant to be admitted and enrolled; *Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act. The said commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes; *and provided, further,* that the rolls of citizenship of the several tribes, as now existing, are hereby confirmed, and any person who shall claim to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may, within three months from and after the passage of this act, desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days after the application thereof.

"In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now living beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud and wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes; *Provided,* That if the tribe or any person be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States district court; *Provided, however,* That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts as provided herein.

"The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the list of members to be filed with the Commissioner of Indian Affairs."

And your petitioner further represents that pursuant to, and acting under, the aforesaid act that the said Commission, known as the Dawes Commission, made and promulgated a rule of practice and procedure to be observed before it, as follows:

"Any person desiring that said Commission shall pass upon his claim for citizenship in any of said tribes, under the provision of this act, must make application in writing, signed and sworn to, containing a particular statement of the grounds upon which his claim is based, and accompanied by such evidence, in the form of affidavits, depositions, or record evidence, as he may desire to have considered in support of his claim, all to be forwarded under seal to the Commission at Vinita, I. T., before the 10th day of September, 1896.

"The application should state facts sufficient, if true, to show that the applicant is entitled to citizenship. The applicant must, at the same time, furnish the chief Governor of the Nation in which citizenship is sought, a copy of such application, and evidence, and shall furnish to the Commission evidence of this fact. Such chief, or governor, must within thirty days thereafter, furnish the Commission his

answer thereto, signed and sworn to by some duly authorized officer of this Government, and accompanied by such evidence in the form of affidavits, depositions or record evidence as he may desire the Commission to consider in support of his answer."

Petitioner states that under the terms of said Act of June 10, 1896, as aforesaid, no provision was made for serving either the chief of the Choctaw or Chickasaw Nations or the nations themselves with notice of said applications to said Dawes Commission and represents that the rule of practice and procedure referred to, made and adopted and promulgated by said Commission, as aforesaid, was made, to the end that the nation or tribe to whom applicants claimed citizenship should have due notice of such application and an opportunity to defend against the same.

2d. Your petitioner would further represent and show to this honorable Court that under the terms and conditions of said Act of Congress of June 10, 1896, as aforesaid, that he applied to said Commission of the United States to the Five Civilized Tribes of Indians, hereafter called the Dawes Commission, to be recognized and identified as a member of the tribe of Chickasaw Indians by blood; and that he complied with the rules of practice and procedure prescribed by said Commission, as aforesaid, and did serve the Governor of the Chickasaw Nation with a literal copy of his said application and evidence in support thereof, and in all things complied with the rules of said Commission and said act referred to *supra*.

And your petitioner further represents that the Chickasaw Nation appeared before said Commission and denied the right of this petitioner to be enrolled or recognized as a member of the tribe of Chickasaw Indians by blood, and that the said Commission heard the evidence offered, for and against said application, and passed upon the same and

denied the application of your petitioner to be enrolled as a member of said tribe ; whereupon your petitioner appealed from the decision of the said Dawes Commission to the United States court for the Southern District of the Indian Territory, sitting at Ardmore, and that his appeal was begun and perfected within the time mentioned in the said Act of Congressof June 10, 1896.

And your petitioner further represents and shows to this honorable Court that at a regular term of said United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and on, to wit, the eighth of March, 1898, your petitioner recovered in said court, against the Chickasaw Nation, a judgment wherein the said court rendered and caused to be entered a decree that your petitioner, U. S. Joins, and his daughter, Virgie Joins, should be admitted as members of the tribe of Chickasaw Indians by blood, and wherein said court directed that a certified copy of said judgment be transmitted by the clerk of said court to the said Commission, and directed the said Commission to place the names of your petitioner and his said daughter, Virgie Joins, upon the roll of Chickasaw citizenship, to be made by the said Commission in accordance with the said Act of June 10, 1896. A certified copy of the judgment rendered in favor of your petitioner, as aforesaid, is attached hereto and identified as Exhibit A and made a part of this petition.

3d. Your petitioner would further represent and show to this honorable Court that on, to wit, the 1st day of July, 1898, the Congress of the United States passed an act, under and by virtue of the terms of which, all persons who had applied to the said Commission to be recognized and enrolled as members of any of the Five Civilized Tribes and whose right had been denied by the Commission and an appeal taken to the United States court in the Indian Ter-

ritory and whose right to enrollment as members of said tribes had been denied by said courts were granted an appeal to this honorable Court, and that the nations against whom judgments had been rendered recognizing and establishing the citizenship of persons claiming to be members of either or any of said tribes were given the right to appeal from the judgments rendered against them direct to this honorable Court.

U. S. Stat. 2 Session, 1897–1898, p. 591.

And your petitioner represents and further shows that pursuant to said act last aforesaid, that the said Chickasaw nation appealed from the decision rendered in favor of your petitioner against it, as aforesaid, directly to this honorable Court and that this Court passed upon the Act of June 10th, 1896, and held the same to be constitutional, and also held that all of the legislation affecting Indian citizenship, under and by virtue of which the said United States courts in the Indian Territory acted in rendering judgment in favor of your petitioner, and others, were valid and constitutional and that the judgments rendered by said courts were final. That this honorable Court, in the case of Stephens *versus* the Cherokee Nation, 174 United States, page expressly passed upon the Act of June 10, 1896, and held the same to be valid and constitutional and that the said Court held that the trial had in the said United States courts in the Indian Territory, to which your petitioner and others had appealed, from said Dawes Commission were properly tried *de novo*, and that the said courts in entertaining appeals from your petitioner, and others similarly situated, did not err in trying said causes *de novo*, and this honorable Court held further that the procedure had in said courts wherein trials *de novo* were had were proper, and quoting from the decision of this honorable

Court, in said cause of Stephens *vs.* Cherokee Nation, cited *supra*, it said:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi judicial* powers by the transfer of their proceedings and decisions, denominated appeals for want of a better term, to judicial tribunals for examination and determination *de novo*; and, as will be presently seen, could certainly do so in respect of the action of tribal authorities."

4th. And your petitioner further represents and shows to this honorable Court that on the 22d day of November, 1900, G. W. Dukes, Green McCurtin and others, members of the tribes of Choctaw and Chickasaw Indians, for themselves and for the use and benefit of all the other members of the Choctaw and Chickasaw nations or tribes of Indians, filed in the United States Court for the Southern District of the Indian Territory, at Ardmore, their complaint or bill in equity against William Goodall, Richard Goodall, John Goodall, J. M. Forbes, and others, and all persons claiming to be members of the Choctaw or Chickasaw nations or tribes of Indians by virtue of decrees of the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South MacAlister and Ardmore, and commonly known as court claimants.

That in said complaint or bill in equity the said complainants in said cause alleged that all judgments rendered by the United States Court for the Southern District of the Indian Territory and by the United States Court for the Central District of the Indian Territory were void upon their face, because the proceedings in said courts were contrary to the due course of legal procedure in force in the Indian Territory and contrary to all those rules and prin-

ciples which have been established by the jurisprudence of the United States of America, for the protection and enforcement of private rights, and alleged further that the said judgments rendered by said courts for the Southern and Central Districts of the Indian Territory were void because each and every member of the tribes of Choctaw and Chickasaw Indians were not served with notice of the application of those in whose favor the judgments were rendered, made to the Dawes Commission for enrollment as members of the tribes of Choctaw and Chickasaw Indians, and because but one and not both of the Governors of the said Choctaw and Chickasaw Nations were served with notice of said applications.

That the said bill in equity was in the nature of a bill of review filed in said Court for the Southern District of the Indian Territory, and had for its purpose the review of the error, if any was committed, by the Court for the Central and the Southern Districts of the Indian Territory, in rendering judgments in favor of your petitioner, and divers and sundry other persons, without requiring notice of the application to the Dawes Commission and notice of the appeal to the court as aforesaid, to be first given to both the Choctaw and Chickasaw Chiefs or Governors and to each member of both of said tribes.

Your petitioner further represents and shows to this honorable Court that the United States Court for the Southern District of the Indian Territory was a court of general and competent jurisdiction and had the jurisdiction and power to entertain the said bill in equity, as aforesaid, filed by G. W. Dukes and others, against William Goodall and others, as aforesaid, and that after said suit was filed in said court the said defendants named in said bill in equity appeared in said court and demurred to the bill in equity filed by the said Dukes and others, and filed an answer deny-

ing certain allegations of fact contained in said bill, and your petitioner represents that the said court passed upon and adjudicated the said questions of notice involved in said suit as aforesaid, adverse to the contentions of the said plaintiffs or complainants in said bill in equity; and he further shows to this honorable Court that from the decision rendered by the said Court for the Southern District of the Indian Territory an appeal was taken by complainants therein to the United States Court of Appeals for the Indian Territory, and that said appeal is now pending before said Court of Appeals and is numbered on the docket of said Court of Appeals No. 403, and is entitled and styled, G. W. Dukes *et al.*, appellants, *versus* G. W. Goodall, *et al.*, appellees.

And your petitioner further represents and shows that the said Court of Appeals, as aforesaid, is a court of competent appellate jurisdiction, competent under the law to review, pass upon and adjudicate the question, if any there be, of the want of notice, as aforesaid, and he represents and shows to this honorable Court that the said case of Dukes against Goodall, as aforesaid, is yet pending upon the docket of said Court of Appeals, undertermined by said Court.

5th. Your petitioner further represents and shows to this honorable Court that he is a member of the tribe of Chickasaw Indians by blood, and that since the decree was rendered by the United States Court for the Southern District of the Indian Territory, as aforesaid, recognizing and identifying the petitioner as a member of said tribe he has made lasting and valuable improvements upon a tract of land situated in the Chickasaw Nation, Indian Territory; that he has expended upon said land fifteen thousand dollars in the way of building a stone residence, reducing said land to cultivation, building fences, etc., etc.

6th. Your petitioner further represents and shows to this honorable Court that on the 21st day of March, 1902, and after your petitioner had obtained said decree against the Chickasaw Nation, as aforesaid, and after this honorable Court had, upon appeal, passed upon and affirmed said decree, and after your petitioner had expended said monies in improving said land, as aforesaid, and while said cause of Dukes *et al. vs.* Goodall *et al.* was still pending in the United States Court of Appeals for the Indian Territory, that the Commission to the Five Civilized Tribes, known as the " Dawes Commission " and the Choctaw and Chickasaw Indians, by their duly accredited delegates, entered into an agreement or treaty, which subsequently was ratified and comfirmed by the Congress of the United States and by a majority vote of the members of the tribes of Choctaw and Chickasaw Indians; that sections 31 and 32 of said treaty read as follows:

31. " It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens in the Choctaw and Chickasaw Nations respectively, without notice of the proceeding in such courts being given to each of said nations; and, it being insisted by said nations that in such proceedings notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial *de novo* of the question of citizenship; and, it being desirable to finally determine these questions, the two nations jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in

equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants of said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of the said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly papers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication.

"Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which judgment or decision is so annulled or vacated, shall upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accom-

panied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed, in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

"32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified, and shall be taken, conducted and disposed of in the same manner as appeals by said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: Provided, that paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this act of Congress."

That under Section 33 of said treaty a court was created, known and designated as the Choctaw and Chickasaw Citizenship Court; and that pursuant to the terms of said treaty the President of the United States appointed as judges of said court the Honorable Spencer B. Adams, chief judge, and the Honorables Walter B. Weaver and Henry S. Foote, associate judges.

And your petitioner represents and shows to this honorable Court that under the terms of Section 31 of said treaty, copied *supra*.

The Choctaw and Chickasaw nations or tribes of Indians filed in said Choctaw and Chickasaw Citizenship Court their bill in equity against J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold and John H. Bratcher, for themselves, and as representatives of all persons similarly situated, claiming to be members of the Choctaw or Chickasaw nations or tribes of Indians by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as "Court Claimants." A duly authenticated copy of said bill in equity is hereto annexed and identified as "Exhibit B," and made a part of this petition.

That the said Choctaw and Chickasaw Nation in said bill in equity sought to cancel, set aside and vacate all the judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory in favor of the ten persons named in said bill and in favor of your petitioner and divers and sundry other persons not named therein.

That the ten persons named in said bill were personally served with process and summons, but your petitioner was not named therein, and was not served with notice of said

suit other than a general notice by publication in a newspaper, although he permanently resided and had his domicil in the Chickasaw Nation, Indian Territory, and within the reach of the process of said court.

And your petitioner represents that in said suit of the Choctaw and Chickasaw Nations against J. T. Riddle *et al.*, the defendants named in the bill filed therein appeared and demurred to said bill, and that their demurrer by said court was overruled and denied, and that thereupon they filed an answer to said bill wherein they denied that notice of the proceedings in the court of the Central and Southern Districts to both the Choctaw and Chickasaw Nations was indispensable to the validity of the judgments rendered by said courts, and denied that a trial of said causes in said courts *de novo* was such an irregularity as made said judgments invalid or void; that said Citizenship Court on December 17, 1902, in said cause, entitled and styled "The Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle *et al.*," and numbered No. 1 on the docket of said court, held that the judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory, in favor of the defendants named in said bill in equity and all those not named but similarly situated were void, and held that notice to each of the Choctaw and Chickasaw nations or tribes of Indians of the proceedings in the United States Courts in the Indian Territory, acting under the Act of June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens in the Choctaw and Chickasaw Nations respectively, was indispensable; and that the proceedings and trial of said cases *de novo*, in said courts rendered said judgments void and on said date, to wit, the 17th day of December, 1902, said Citizenship Court, in said cause No. 1, entitled and styled as aforesaid, ordered, adjudged and decreed that all of said judgments, decrees and

decisions rendered by the United States Courts in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations, respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill in said proceeding, as well as those who have come in and made themselves parties thereto, and the judgments rendered, as aforesaid, in favor of all persons similarly situated, by said decree of said Citizenship Court and by the express terms of the decree were attempted to be set aside, annulled, vacated and held for naught.

That petitioner was not a party defendant in said proceedings in said Citizenship Court and did not appear or answer therein in person or by attorney.

That Julia London and others filed an answer in said cause in said Court and denied that said Choctaw and Chickasaw Citizenship Court had the power or jurisdiction to inquire into and pass upon the validity of said judgment sought to be cancelled, as aforesaid, under and by virtue of the terms of said treaty.

But petitioner states that said plea to the jurisdiction of said court was by said court overruled and denied. A copy of said answer is hereto annexed, marked " Exhibit C," and made a part hereof, and a copy of the original decree of said Citizenship Court is hereto annexed, marked " Exhibit D," and made a part hereof, and a copy of the amended decree of said court is hereto annexed, marked " Exhibit E," and made a part hereof.

Your petitioner further represents and shows to this honorable Court that under the terms of said treaty your petitioner cannot review the decision of said Citizenship Court by Appeal or Writ of Error, and under no other law can he review same by appeal or writ of error, and that the

effect of said decision is to destroy the validity of the judgment of petitioner recovered in the United States Court, as aforesaid, and that said Citizenship Court is about to certify to said decree by it rendered, and deliver same to the said Commission to the Five Civilized Tribes for its observance, which will in effect prevent said Commission from enrolling the name of petitioner as a member of the tribe of Chickasaw Indians, and thereby destroy the property rights of this petitioner, as aforesaid.

Wherefore, your petitioner states that the said Citizenship Court had not the power or jurisdiction to render, and acted under an assumed jurisdiction in rendering said decision, in said cause against J. T. Riddle *et al.*, as aforesaid, for the following reasons:

1st. Because said section 31 of said treaty, *supra*, is unconstitutional in that it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction.

2d. Because at the date of the passage and ratification of said treaty both the questions of law named therein had been submitted to, passed upon and adjudicated by courts of competent jurisdiction in a controversy between the same parties, as hereinbefore shown.

3d. Because under said section 31 of said treaty decrees rendered by the United States Courts of the Central and Southern Districts of the Indian Territory, upon appeal from the Dawes Commission, have been by said Citizenship Court set aside, cancelled and held for naught because *notice* of the proceedings in said courts had not been given to both the Choctaw and Chickasaw Nations prior to the rendition of said decrees; whereas decisions rendered by the Dawes Commission, under Act of June 10, 1896, admitting persons to Choctaw or Chickasaw citizenship with *notice to one* of said nations only and *not to both* are binding upon

both said nations, and petitioner therefore says said section 31 discriminates between persons in exactly the same status and is class legislation and unconstitutional.

4th. Said section 31 of said treaty attempts to confer upon said Citizenship Court the power to set aside and cancel judgments in favor of petitioner and others without notice to those to be affected thereby, and attempts without process of law to destroy said judgments and the petitioners' property rights.

Wherefore, and by reason of the premises aforesaid, your petitioner prays:

First. That this honorable Court do grant to him a writ of certiorari directed to said Choctaw and Chickasaw Citizenship Court, and each of the judges thereof, and James B. Cassada, the clerk of said court, commanding and requiring them to at once forward to and file with the clerk of this honorable court in this proceeding, a true and correct copy, under the seal of the clerk thereof, of all the pleadings, evidence, judgments, orders and decrees, and the opinion of said court, filed or lodged with said clerk, or recorded upon the journals of said Choctaw and Chickasaw citizen court in said cause No. 1, lately pending on the docket of said court and entitled and styled the Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle *et al.*

Second. And by reason of the premises aforesaid, your petitioner prays for a writ of prohibition against the said Choctaw and Chickasaw Citizenship Court, and all the judges thereof, prohibiting and restraining it, and each of said judges from giving further effect to the decree rendered by said Court, as aforesaid, and prohibiting and restraining said court and each of the judges and the clerk thereof from certifying and delivering to the said Dawes Commission a copy of said decree for its observance and

prays for such other and further relief to which he may be entitled.

U. S. JOINS,
By WM. I. CRUCE and
CALVIN L. HERBERT.
Its Attorneys.

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA. } *ss*:

Before me, the undersigned authority, on this day, personally appeared W. I. Cruce, who, after being by me duly sworn, deposes and says: That he is attorney for U. S. Joins, petitioner in the foregoing petition; that said Joins is not present to make this affidavit, and that the statements in the foregoing petition are true as he verily believes.

W. I. CRUCE.

Subscribed and sworn to before me this 27 day of February, 1903.

WM. A. EASTERDAY,
[SEAL.] *Notary Public D. C.*

EXHIBITS.

"Exhibit A."

COPY OF ORDER OF COURT.

UNITED STATES OF AMERICA,
Indian Territory,
Southern District. } ss:

In the United States Court in the Indian Territory, Southern District, at a term thereof begun and held at Ardmore, in the Indian Territory, on the 1st day of November, A. D. 1897; Present, the Honorable Hosea Townsend, Judge of said Court.

The following order was made and entered of record, to-wit:

U. S. JOINS *et al., Plaintiffs,*
vs.
CHICKASAW NATION, *Defendant.* } Judgment.

This day this cause coming on to be heard, upon the pleadings, exhibits, proof, Master's report and exceptions filed thereto; and the court, being sufficiently advised upon the whole case, is of opinion that said report should be in all respects confirmed, except that same should be corrected so as to disallow the applicant, Mrs. Mattie A. Joins, wife of U. S. Joins. But that same should in all other respects be confirmed.

It is, therefore, ordered, adjudged and decreed by the court that the applicants, U. S. Joins, and Virgie Joins, his daughter, be, and they are each hereby, admitted as mem-

bers of the Chickasaw tribe of Indians by blood; and that the applicant, Mrs. M. L. Joins, mother of U. S. Joins, be, and she is hereby, admitted as a member of the Chickasaw tribe of Indians by intermarriage; and that they each and all have all the rights, privileges and immunities of Chickasaw Indians by blood.

The clerk of this court is hereby ordered to transmit a certified copy of this judgment to the Commission to the Five Civilized Tribes of Indians, which said Commission is hereby directed to place the names of each and all of said parties upon the roll made out by it for the Chickasaw Nation as members of said tribe of Indians.

To this judgment, the Chickasaw Nation, by its attorney, excepts.

UNITED STATES OF AMERICA,
Indian Territory,
Southern District. } ss:

I, C. M. Campbell, Clerk of the District Court of the United States for the Southern District of the Indian Territory, do hereby certify the foregoing to be a true copy of an order made by said Court on the 8 day of March, 1898, as appears from the records of said Court now on file in my office.

In testimony whereof, I have hereunto set my hand, at my office in Ardmore, in said District, this 13 day of February, A. D. 1903.

[SEAL.]

C. M. CAMPBELL,
Clerk.
By ——— *Deputy.*

[Endorsed:]

No. 15. U. S. Joins *et al. versus* Chickasaw Nation. Copy of Order of Court. ———, Clerk. By ———, Deputy.

"Exhibit B."

IN THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT, SITTING AT SOUTH McALESTER, DECEMBER TERM, 1902.

THE CHOCTAW AND CHICKASAW NATIONS OR TRIBES OF INDIANS, *Plaintiffs,*

vs.

J. T. RIDDLE, D. S. RIDDLE, L. A. RIDDLE, ELIZABETH CASEY, JOSHUA CASEY, ANDREW B. HILL, L. T. HILL, JAMES W. BALTHROP, T. D. ARNOLD and JOHN H. BRATCHER, for themselves, and as representatives of all persons similarly situated, claiming to be members of the Choctaw or Chickasaw Nations or tribes of Indians, by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as "Court Claimants," *Defendants.*

BILL IN EQUITY.

The plaintiffs, the Choctaw and Chickasaw Nations or tribes of Indians, bring this, their Bill in Equity, complaining of the said J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold and John H. Bratcher for themselves, and as representatives of all persons similarly situated, claiming to be members of the Choctaw or Chickasaw Nations or tribes of Indians, by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as "Court Claimants," defendants, and for cause of action, state :

That the members of the Choctaw and Chickasaw Nations or tribes of Indians are the owners, in fee simple, of the following described lands, to-wit:

"Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning."

That under the laws of the United States of America and the various treaties entered into between the members of the Choctaw and Chickasaw Nations or tribes of Indians and the United States of America, the members of said tribes hold said lands in common, the character of said holding being fixed by the following provision of Article One of the treaty entered into between the Choctaw and Chickasaw Nations and the United States of America, on the twenty-second day of June, one thousand eight hundred and fifty-five, viz:

"And pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either Tribe shall have an equal, undivided interest in the whole; Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same;"

That the plaintiffs, the Choctaw and Chickasaw Nations or tribes of Indians have never become extinct or abandoned said lands, but still continue to hold and occupy the

same; that the Government of the United States of America, in pursuance of its policy towards the Choctaw and Chickasaw Nations or tribes of Indians, under laws and treaties entered into, is preparing to allot said above-described lands to the citizens or members of said tribes;

That all these defendants claim to be members of the Choctaw or Chickasaw Nations or tribes of Indians, and as such, entitled to an equal and undivided interest in said lands and the moneys of said tribes, by virtue of certain alleged judgments or decrees of the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South McAlester and Ardmore acting under the Act of Congress approved on the tenth day of June, one thousand, eight hundred and ninety-six;

That all of said persons so claiming to be members of said tribes are several thousand in number, and are similarly situated to the ten persons specially named as defendants herein; and are too numerous to make them parties defendant by name;

That all of said defendants are insisting upon enforcing said alleged judgments or decrees; and if the same are enforced, by allotment to them of equal shares of the lands and moneys of said tribes, it will wrongfully deprive the members thereof of property of the value of many millions of dollars, and thereby proportionately decrease the share which each member would otherwise receive.

The plaintiffs, further complaining of the defendants, state that all of the judgments of said court in the Indian Territory, acting under the Act of Congress approved June tenth, one thousand, eight hundred and ninety-six are illegal and void; that no valid judgments affecting said lands and moneys could, in any event, have been rendered without notice to both of said Nations or tribes; and plaintiffs allege, that, as appears from said alleged judgments, in no case in

which a judgment was rendered purporting to admit any of said defendants to citizenship in either of said tribes, was notice given of the pendency of said proceedings to each of said Nations or tribes; and that in no case was a judgment taken against both of said Nations or tribes; and the plaintiffs insist that due and lawful notice to each of said tribes was indespensable to the rendition of valid judgments.

Certified copies of two of said alleged judgments, one purporting to be against the Choctaw Nation, and one purporting to be against the Chickasaw Nation are herewith filed and made a part of this Bill, marked respectively exhibits "A" and "B"; and plaintiffs allege that all of said judgments or decrees purporting to be against the Choctaw Nation are, in substance, identical with exhibit "A" hereto attached; and that all of said judgments or decrees purporting to be against the Chickasaw Nation are, in substance, identical with exhibit "B" hereto attached; and that owing to the great number of said alleged judgments or decrees, it is impracticable to exhibit herewith a copy of each.

Plaintiffs further state that all of said proceedings were contrary to the due course of legal procedure in force in the Indian Territory, and contrary to all of those rules and principles which have been established by the jurisprudence of the United States of America, for the protection and enforcement of private rights; that said persons are not entitled, under said alleged judgments, to enrollment as members of said tribes, and to shares of said lands and moneys; and that it would be inequitable and unjust for the Government of the United States to take such action or permit the same to be done.

Plaintiffs, further complaining of the defendants, state that the proceedings in the United States Court in the Indian Territory under the said Acts of Congress approved June tenth, one thousand, eight hundred and ninety-six, in

the rendition of the said alleged decrees, should have been confined to a mere review of the action of the Commission to the Five Civilized Tribes upon the papers and evidence submitted to such Commission, and that said Court should not have tried said cases *de novo;* and plaintiffs allege that the action of said Court in trying said cases *de novo*, and in rendering the alleged judgments aforesaid was illegal and void; and that all of said evidence of a documentary nature which has become a part of the alleged record of said Court in said cases, was unlawfully taken, and that, for that reason, all of said proceedings are of no force and effect.

Plaintiffs further state that they have no adequate remedy at law by which they can redress the great wrongs threatened them; and they therefore bring this their Bill in Equity, praying for said relief.

Wherefore, the premises considered, the plaintiffs pray this Honorable Court to enter its decree declaring all of said judgments so rendered by the United States Court in the Indian Territory, acting under the Act of Congress approved June tenth, one thousand eight hundred and ninety-six, illegal and void, annulling and vacating the same; and declaring all of said proceedings of said Court in trying said cases *de novo*, in which alleged judgments were rendered upon appeal from the Five Civilized Tribes, illegal and void and of no force and effect, and for all other and further relief to which, in equity and good conscience they are entitled; and plaintiffs will ever pray.

MANSFIELD, MCMURRAY & CORNISH,
Solicitors for the Choctaw and Chickasaw Nations or tribes of Indians.

I, James B. Cassada, Clerk of the Choctaw and Chickasaw Citizenship Court, certify that the above is a true and cor-

rect copy of a Bill in Equity, filed in my office, at South McAlester, on the 26th day of September, 1902, at 9 o'clock, A. M., by the Choctaw and Chickasaw Nations, or tribes of Indians, against J. T. Riddle *et als.*, Defendants.

Witness my hand and official seal, this the 18th day of October, 1902.

JAMES B. CASSADA,
[SEAL.] *Clerk of the Choctaw and Chickasaw Citizenship Court.*
By E. D. BEVITT,
Deputy Clerk.

"Exhibit C."

IN THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT, SITTING AT SOUTH McALESTER.

THE CHOCTAW AND CHICKASAW NATIONS, OR TRIBES OF INDIANS,
Plaintiffs.

v.

J. T. RIDDLE, *et. al.*, for themselves and as representatives of all persons similarly situated,
Defendants.

Answer.

SEPARATE ANSWER OF JULIA LONDON AND OTHERS.

Now comes Julia London, Thos. W. Broom, J. E. Broom, Frank P. Broom, Alhannan Broom, Chas. W. Broom, Mollie Shoop, Jesse London, Dillard London, Daniel Shoop, Wm. C. Shoop, George Shoop, Siddie Shoop, Alhannan Broom, Jr., Eunice Broom, Irene Broom, Jas. C. Broom, Mary F. Broom, Maria Broom, Elizabeth Broom, Annie

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Broom, and Mary Broom, and for their separate answer to the bill of complaint herein say:

1. Saving and reserving their exceptions and objections heretofore by them taken upon their demurrer to the said bill of complaint, they state:

These defendants deny that this court has jurisdiction, or power to entertain this bill for the purpose of setting aside, cancelling and annulling the said judgments of the United States Court, for the Indian Territory, which are mentioned and set forth in the complaint, and they say, that the said judgments were pronounced and rendered by a court, having jurisdiction of the subject matter herein involved and of the necessary parties thereto, in an adversary litigation had for that purpose, and that the judgments so rendered were and are final and conclusive of the said matters herein involved and by this bill sought to be again adjudged in this original proceedings upon alleged errors and irregularities in the proceedings taken, and not upon matters of merit, so that, these defendants here specially plead the said judgments as being *res judicata* and final, of the matters therein adjudged; and they deny that it is within the constitutional power of the Congress, to provide by legislative enactment, for the setting aside, cancelling and annulling the said judgments.

2. These defendants deny that the Choctaw and Chickasaw Nations, or Tribes of Indians, the plaintiffs herein are the owners in fee simple of the lands and property mentioned and described in the bill of complaint, as is set forth and stated in the complaint, but they state the facts in relation to the ownership of the said lands and property, are, that the Choctaw Nation, alone, is the sole owner and holder of the title to the said lands and property; that the United States, by its deed of patent, duly made, executed and delivered, under date of the 23rd day

of March, 1842, which said deed of patent is duly entered of record in the General Land Office, in volume 1, at page 43, of the Records of that office; and that, if it be true, as a matter of law, or fact, that the said Chickasaw Nation at any time thereafter, acquired and now has any interest whatsoever in the said lands and property, the defendants aver that such interest was, at most, nothing more than a mere equitable interest, or right therein, unaccompanied by the legal title thereto, and that, if it be true, that the said Chickasaw Nation, or the members of the said Nation or Tribe of Indians, either by virtue of the provisions of the alleged treaty of 1855, or otherwise, ever at any time acquired any interest in the said lands and property, such interest was merely an equitable right, or interest and did not affect the legal title, which was then and has at all times since the said deed of patent aforesaid vested exclusively in the Choctaw Nation.

These defendants further state that pursuant to the Act of Congress of June 10th, 1896, they made formal application, conformable to the terms of said act, to the Commission to the Five Civilized Tribes for enrollment, as members by blood, of the Choctaw Nation and not as members of the Chickasaw Nation, that such notice as was prescribed by the rules and regulations, adopted by the said Commission, was duly given, of their said application, and that no other, or further notice was in any manner required; and that thereafter, these defendants duly prosecuted an appeal from the ruling and decision of the said Commission, to the United States Court, for the Indian Territory, in the Central District thereof, in accordance with the terms and provisions of the said act of Congress, and that, these defendants gave notice of the said appeal, in manner and form, as was prescribed by the orders and rules of the said Court; and that, prior to the trial of the said appeal which

was depending in the said Court for a long space of time, the said Choctaw Nation by its authorized agents and attorneys duly and regularly appeared in the said cause and contested the same, before and until judgment was rendered therein, adjudging and decreeing that these defendants were members, by blood, of the Choctaw Tribe of Indians and of the said Choctaw Nation ; and that, no matter was involved, in that proceedings, save only the question, as to whether or not, these defendants were members of the said Choctaw Tribe of Indians, so that these defendants allege it to be the fact that due and ample notice of the said proceedings was given and by the said appearance and contest waived, and that, in no event was notice to the said Chickasaw Nation requisite, or needful to a full and lawful determination of the matters involved therein.

3. And further answering these defendants say, they deny that the trial of the said cause by the said court, *de novo*, was without legal authority, but aver it to be the fact, that such method of trial was lawful and the only appropriate means of determining the said controversy ; that the said Chocktaw Nation consented and agreed to proceed *de novo*, in the trial of said cause and cannot now in equity be heard to object to such method of trial.

So that these defendants deny that the said judgments recovered by them in the said proceedings mentioned and set forth in the bill of complaint are illegal and void, for either the reasons stated in the bill or for any reasons whatsoever ; and they deny that the said bill shows any equity whatsoever, or that the plaintiffs are in any manner entitled to relief in this proceeding.

Wherefore having fully answered, they pray to be hence discharged with their reasonable costs.

TOM. W. NEAL and
WARNER & BUCKLEY,
Sol's for Defendants.

No. 1.

And the above is endorsed as follows:

Choc. & Chic. Nations
vs.
J. T. Riddle, *et al.*

Sep. Answer of Julia London *et al.*,
and to apply in matter of Joshua & Elizabeth Casey.

Filed December 10th, 1902
James B. Cassada,
Clerk.

Page 4, Gen. Docket.

Neal & London and
Warner & Buckley.

" Exhibit D."

WEDNESDAY, *December 17, 1902.*

Court met pursuant to adjournment.

Present and presiding the Honorable Spencer B. Adams, Chief Judge, Walter L. Weaver, and Henry S. Foote, Associate Judges.

THE CHOCTAW & CHICKASAW NATIONS,
Plaintiffs,
vs.
J. T. RIDDLE, *et al.*,
Defendants.

When the following proceedings were had, to-wit:

The Court then in open court delivered the opinion in the case of the Choctaw & Chickasaw Nations against J. T. Riddle, *et al.*, and as to all others making themselves parties to the cause or defendants and all other persons similarly and so situated as the ten defendants made origi-

nal parties to the bill filed herein and gave its judgment and decision therein as follows:

Final Decree.

THE CHOCTAW & CHICKASAW NATIONS OR TRIBES OF INDIANS, *Plaintiffs,*

vs.

J. T. RIDDLE, D. S. RIDDLE, L. A. RIDDLE, ELIZABETH CASEY, JOSHUA CASEY, ANDREW B. HILL, L. T. HILL, JAMES W. BALTHROP, T. D. ARNOLD, J. H. BRATCHER, for themselves and as representatives of all persons similarly situated, claiming to be members of the Choctaw & Chickasaw Nations, by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South McAlester and Ardmore and commonly known as Court Claimants, *Defendants.*

Cause No. 1. In the Choctaw and Chickasaw Citizenship Court, sitting at South McAlester, December Term, 1902.

This day this cause came on to be heard, and having been fully argued by counsel, was submitted to the Court on the pleadings, exhibits, and testimony; upon consideration whereof, the Court finds; That due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity to law;

That said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of the said defendants, who desired to be heard were heard; that notice to each of the said, the Choctaw and Chickasaw Nations, or tribes, in each and every of the applications for admission, or enrollment as citizens in either of said nations or tribes, in the proceedings heretofore had, for that purpose, before the Commission to the Five Civilized Tribes under the Act of Congress approved June 10th, 1896, was in-

dispensable and that like notice to each of the said nations or tribes in the proceedings on appeal from the decisions of said Commission, and which were heard in the United States District Courts, within and for the Central and and Southern Districts of the Indian Territory, was likewise indispensable; and the Court further finds, on the issue joined, that such notice was not given to both of said Nations or tribes in said proceedings before said commission or in said Courts on said appeals; and the court further finds, that on the hearing of said causes in said United States District Courts, the said Courts, and each of them, proceeded to hear and determine said causes *de novo*, and in said hearings, did not confine the same to a review of the proceedings, heretofore had, in said causes, before said Commission; That by reason of each, and both, of said facts, to-wit, That said hearings before the said Commission and in said United States District Courts, were without notice, given to both, of said Nations or tribes, and by reason of the trial, of said causes, in said United States District Courts, *de novo*, all the said findings, orders, judgments, and decrees, of said Commission, and said Courts, admitting any, and all, such persons, to citizenship, or enrollment, in said Nations, or tribes, or either of them, ought to be set aside, annulled, and held for naught.

It is, therefore, ordered, adjudged, and decreed that each and every of such judgments, orders, and decrees so rendered and entered as aforesaid, by said Commission without notice to both of said nations or tribes, or upon hearing in said United States District Courts and either of them, upon trials *de novo*, are set aside, annulled, and held for naught.

SPENCER B. ADAMS, *Chief Judge.*
WALTER L. WEAVER, *Associate Judge.*
HENRY S. FOOTE, *Associate Judge.*

And coming J. G. Ralls, and C. T. Herbert, Esqs., in open court representing certain defendants herein, and asked and requested permission of this court to file exceptions to the rulings and decisions of the Court herein, whereupon the Court having duly considered said requests, and all of them, refused to allow said exception, or any of them, or to permit the same to be filed, as such, or to sign, or entertain the said requests, and decides and determines that no right of appeal lies from the decision of said Court, the same being by law made final, and therefore, no exceptions, or bills of exception, can by law be settled, or signed, or allowed, by this Court, or will be allowed, and, therefore, this Court refuses to grant all or any of said requests.

"Exhibit E."

THE CHOCTAW AND CHICKASAW NATIONS, OR TRIBES OF INDIANS, *Plaintiffs,*

vs.

J. T. RIDDLE, D. S. RIDDLE, L. A. RIDDLE, ELIZABETH CASEY, JOSHUA CASEY, ANDREW B. HILL, L. T. HILL, JAMES W. BALTHROP, T. D. ARNOLD, J. H. BRATCHER, for themselves and as representatives of all persons similarly situated, claiming to be members of the Choctaw and Chickasaw Nations, by virtue of alleged decrees, of the United States Court, for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore and commonly known as Court Claimants, *Defendants.*

Cause No. 1. In the Choctaw and Chickasaw Citizenship Court, sitting at So. McAlester, December 17, 1902.

This cause coming on further to be considered and it appearing to the Court, that the paper writing purporting to

be the judgment of this Court herein, heretofore filed with the Clerk, does not conform to the written opinion announced and rendered by the Court, which has been filed and entered as a part of the Record herein, it is therefore ordered, adjudged and decreed by the Court that said paper writing, purporting to be the judgment of this Court herein, of date the 17th day of December, 1902, be and the same is hereby amended and the following is the true judgment, intended to be entered by this Court herein of that date and the same is hereby entered of record as the judgment of this Court in this case, in accordance with the said opinion and that the same be so filed, *nunc pro tunc* as of date the 17th day of December, 1902, as follows, to wit:

This day this cause came on to be heard, and having been fully argued by counsel, was submitted to this Court on the pleadings, exhibits and testimony, upon consideration whereof, the Court finds:

That due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity to law;

That said defendants appeared at the hearing hereof, in person and by counsel and that each and all of said defendants, who desired to be heard, were heard;

That notice to each of said Choctaw and Chickasaw Nations, or Tribes of Indians of the proceedings in the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, was indispensable;

And the Court further finds on the issues joined, that such notice was not given to both of said Nations or Tribes of Indians of said proceedings in the United States Courts in the Indian Territory;

And the Court further finds, that, in said proceedings, in the United States Courts in the Indian Territory, and said

Courts proceeded to hear and determine said causes *de novo*, and did not confine the same to a review of the proceedings had before the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission;

That by reason of each of said facts, to-wit; that the proceedings in said United States Courts, were had without notice to each of said tribes or nations, when notice to each of said nations was indispensable, and that said United States Courts tried said causes, *de novo* when their action should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, all of said proceedings, decrees and decisions, of said United States Courts in the Indian Territory, admitting any and all persons to citizenship or enrollment as such citizens, in said Nations or Tribes of Indians, or either of them, ought to be set aside, annulled and vacated.

It is, therefore, ORDERED, ADJUDGED and DECREED, that all of said judgments, decrees and decisions, rendered by the United States Courts in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill in this proceeding, as well as to those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid in favor of all persons similarly situated, are set aside, annulled, vacated and held for naught.

(Signed) SPENCER B. ADAMS,
Chief Judge.

(Signed) WALTER L. WEAVER,
Associate Judge.

(Signed) HENRY S. FOOTE,
Associate Judge.

I, James B. Cassada, Clerk of the Choctaw and Chickasaw Citizenship Court, do hereby certify that the foregoing papers are a part of the Record of the Choctaw and Chickasaw Citizenship Court, now on file or of record in my office, as Clerk of the said Court, at South McAlester, Indian Territory, in the case of "The Choctaw and Chickasaw Nations, or Tribes of Indians, Plaintiffs, *vs.* J. T. Riddle, *et al.*, for themselves and as representatives of all persons similarly situated, claiming to be members of the Choctaw or Chickasaw Nations, or Tribes of Indians, by virtue of alleged decrees of the United States Court, for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as 'Court Claimants,' Defendants." Said case being Case No. One on the Docket of said Court, being all of the papers in said case and all of the said record, which I was requested this day to have transcribed and certified to, by C. L. Herbert and W. I. Cruce, Esqs., and I further certify that the foregoing is not an entire transcript of said record, nor all of the papers filed in the above entitled cause, but only so much thereof, as I was requsted by the persons aforesaid to transcribe and certify to.

In witness whereof, I have hereunto signed my name and affixed the seal of the said Court, at South McAlester, Indian Territory, on the 14th day of February, 1903.

[SEAL.] JAMES B. CASSADA.

[Endorsed :]

Supreme Court of the United States. October Term, 1902. No. Original. *Ex-Parte:* In the matter of U. S. Joins, Petitioner.

Motion for leave to file petition for writ of prohibition, and for certiorari, against the Choctaw and Chickasaw Citizenship Court, and the Judges and Clerk thereof, and the petition for same.

WILLIAM I. CRUCE and CALVIN L. HERBERT,
Counsel for Petitioner.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Supreme Court U.
FILED
MAR 23 1903
JAMES H. McKENNEY,
Cle

Ex Parte: In the Matter of U. S. Joins, Petitioner

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Brief in Support of Motion for Leave to File Petition for Writ of Prohibition, and for Certiorari, against the Choctaw and Chickasaw Citizenship Court and Brief in Reply to Brief Filed Herein by the Choctaw and Chickasaw Nations Against Said Motion.

WILLIAM I. CRUCE,
CALVIN L. HERBERT,
Counsel for Petitioner, U. S. Joins.

SAXTON PRINTING CO., WASHINGTON.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No.

In the matter of the Motion of U. S. Joins for leave to file Petition for Writ of Prohibition and Certiorari against the Choctaw and Chickasaw Citizenship Court.

Brief in Support of Said Motion, and in Reply to Brief Filed by the Choctaw and Chickasaw Nation against the same.

STATEMENT AND BRIEF OF THE PETITIONER, U. S. JOINS.

June 10, 1896, the Congress of the United States passed an act, by the terms of which it conferred upon the Commission of the United States to the Five Civilized Tribes of Indians hereafter called the "Dawes Commission."

The power and authority to "hear and determine the

application of *all* persons who may apply to to them for citizenship in any of said nations, and after such hearing *to determine the right* of such applicant to be admitted and enrolled." The act required all applications to said Commission for enrollment to be made withiu three months from date of its passage, and required the Commission to decide all such applications within ninety days after the same were made. It also required said Commission in "determining all such applications to respect all *laws* of the several nations or tribes, not inconsistent with laws of the United States, and all *treaties* with either of said nations or tribes, and to give due force and effect to the *rolls*, *usages* and *customs* of each of said nations or tribes"; and provided that the rolls of citizenship of the said several tribes then existing should be confirmed, and that "any person who shall claim to be *added* to said rolls as a citizen of either of said tribes, and whose right thereto has neither been *denied* or *not acted upon*, or any citizen who may, within three months from and after the passage of this act, desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days after the application therefor." The act conferred upon said Commission the power to administer oaths, to issue process for and compel the attendance of witnesses and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatever heretofore taken where the witnesses giving said testimony are dead, or living beyond the limits of said Territory, and to use every fair and honorable means within their reach for the purpose of determining the *rights* of persons *claiming such citizenship*, or to *protect any of said nations from any wrong*, and the rolls prepared by them shall be hereafter held and considered to be the *true and correct rolls of persons entitled to the rights of citizenship in said several tribes;*

provided, that if the *tribe* or *any person* be aggrieved with the decision of the tribal authorities, or the *Commission* provided for in this act, *it* or *he* may *appeal* from such decision to the United States District Court ; *provided, however*, that the *appeal* shall be taken within *sixty days*, and the *judgement of the court shall be final.*" This act did not provide for *notice* of applications for enrollment to said Commission to be given to the tribe or nation in which the applicant sought recognition as a member, nor did it require notice to be given to said nation or tribe of an appeal to the court from the decision of the Commission. See act copied on page 3, *et seq.*, of petition for writ attached to motion.

The Dawes Commission by rules by it made and promulgated did require the applicant to "furnish *the Governor of the nation in which citizenship is sought* a copy of such *application*, and *evidence*, and furnish to the Commission evidence of such fact," and require the governor or chief of the nation so served, within thirty days thereafter to *answer* said application *under oath*, and to accompany the same by such evidence in the form of affidavits, depositions or record evidence as he may desire the Commission to consider in support of his answer—See rules of Dawes Commission, page 5 et seq. of the petition. The petition further shows that the petitioner, U. S. Joins, in compliance with the act of June 10, 1896, *supra*, and the rules by said Commission, made and promulgated thereunder, made application to said Commission to be identified and enrolled as a member of the tribe of Chickasaw Indians by blood; that he did serve the Governor of the Chickasaw Nation with a literal copy of the said application and the evidence in support thereof, and in all things complied with the said act of June 10, 1896, and the rules of the Commission thereunder; that the Chickasaw Nation appeared before said Commission and denied petitioner's right to be enrolled as a member of the tribe of Chickasaw Indians; that the said Commission heard

the evidence offered for and against his application, and passed upon the same and *denied* the application of the petitioner to be enrolled as a member of said tribe; that the petitioner appealed from the decision of the Commission to the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and that said appeal was perfected within the time provided for under the act of June 10, 1896; that at a regular term of said court at Ardmore, to wit: on the 8th day of March, 1898, petitioner recovered judgment in said court against said nation, wherein said court rendered and caused to be entered a decree that the petitioner, U. S. Joins, and his daughter, Virgie Joins, should be admitted as members of the tribe of Chickasaw Indians by blood, and directed that a certified copy of said decree be transmitted to said Commission, and directed the Commission to place the names of petitioner, and his daughter, Virgie, upon the roll of Chickasaw citizenship, to be made by said Commission in accordance with the act of June 10, 1896. See petition, pp. 6–7, and Copy of Judgment attached as "Exhibit A."

The petition further shows that subsequent to the rendition of the judgment in petitioner's favor, to wit: July 1, 1898, Congress passed an act allowing an appeal by the aggrieved party from all final judgments rendered by the United States Courts in the Indian Territory, pursuant to said act of June 10, 1896, directly to this honorable court. U. S. Stat., 2 Sess. 1897–8, p. 591. That under the provisions of said act an appeal was taken by the Chicasaw Nation directly to this honorable court from the decision in favor of petitioner, cited *supra*, and that this court, in the case, Stephens *vs.* Cherokee Nation, 174 U. S., 445, expressly passed upon the act of June 10, 1896, and held the same to be valid and constitutional, and that all the legislation affecting Indian citizenship, under which the United States courts in the Indian Territory acted, was valid and consti-

tutional, and that the judgments rendered by said courts were final; and in said cause this court expressly decided that the said Dawes Commission possessed only *quasi judicial* powers, and that the cause in the court below upon *appeal* from said Commission were properly tried *de novo*. See Petition 8–9. The petition further shows that in a cause filed in the United States Court for the Southern District of the Indian Territory on November 22, 1900, wherein G. W. Dukes, Green McCurtain, and others, members of the Choctaw and Chickasaw Indians, for the entire tribes of Choctaw and Chickasaw Indians were complainants, and William Goodall and many others, who claimed to be members of the Choctaw or Chickasaw tribe, (by virtue of decrees of the courts under said act of June 10, 1896,) were complainants, the question and issue was directly raised that said judgments were invalid and void because *but one* and not *both* the Choctaw and Chickasaw Nations were served with notice of the *application* to the Dawes Commission to be enrolled prior to the rendition of the judgments in said courts. That said issue by said court was directly passed upon and adjudicated *adverse* to the complainants in said proceeding, and from the decision of said court an appeal was taken to the United States Court of Appeals of the Indian Territory, where the same is now pending and undetermined. See Petition, pp. 9, 10, 11.

The petition further states:

5th. "Your petitioner further represents and shows to this honorable Court that he is a member of the tribe of Chickasaw Indians by blood, and that since the decree was rendered by the United States Court for the Southern District of the Indian Territory, as aforesaid, recognizing and identifying the petitioner as a member of said tribe, he has made lasting and valuable improvements upon a tract of land situated in the Chickasaw Nation, Indian Territory; that he has expended upon said land fifteen thousand dol-

lars in the way of building a stone residence, reducing said land to cultivation, building fences, etc., etc.

6th. Your petitioner further represents and shows to this honorable Court that on the 21st day of March, 1902, and after your petitioner had obtained said decree against the Chickasaw Nation, as aforesaid, and after this honorable Court had, upon appeal, passed upon and affirmed said decree, and after your petitioner had expended said monies in improving said land, as aforesaid, and while said cause of Dukes *et al. vs.* Goodall *et al.* was still pending in the United States Court of Appeals for the Indian Territory, that the Commission to the Five Civilized Tribes, known as the 'Dawes Commission,' and the Choctaw and Chickasaw Indians, by their duly accredited delegates, entered into an agreement or treaty, which was subsequently ratified and confirmed by the Congress of the United States and by a majority vote of the members of the tribes of Choctaw and Chickasaw Indians; that sections 31 and 32 of said treaty read as follows:

> 31. "It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens in the Choctaw and Chickasaw Nations, respectively, without notice of the proceeding in such courts being given to each of said nations; and, it being insisted by said nations that in such proceedings notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States Courts in Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission,

and should not have extended to a trial *de novo* of the question of citizenship; and, it being desirable to finally determine these questions, the two nations jointly, or either of said nations acting separately, and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said sourts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants of said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of the said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly papers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication.

"Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons or for enrollment by said United States courts in the

Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which judgment or decision is so annulled or vacated, shall upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed, in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

"32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally

ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review and revise all such judgments, both as to findings of facts and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified, and shall be taken, conducted and disposed of in the same manner as appeals by said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: Provided, that paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this act of Congress."

That under Section 33 of said treaty a court was created, known and designated as the Choctaw and Chickasaw Citizenship Court; and that pursuant to the terms of said treaty the President of the United States appointed as judges of said court the Honorable Spencer B. Adams, chief judge, and the Honorables Walter B. Weaver and Henry S. Foote, associate judges.

And your petitioner represents and shows to this honor-

able Court that under the terms of Section 31 of said treaty, copied *supra*,

The Choctaw and Chickasaw nations or tribes of Indians filed in said Choctaw and Chickasaw Citizenship Court their bill in equity against J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold and John H. Bratcher, for themselves, and as representatives of all persons similarly situated, claiming to be members of the Choctaw or Chickasaw nations or tribes of Indians by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as "Court Claimants." A duly authenticated copy of said bill in equity is hereto annexed and identified as "Exhibit B," and made a part of this petition.

That the said Choctaw and Chickasaw Nation in said bill in equity sought to cancel, set aside and vacate all the judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory in favor of the ten persons named in said bill and in favor of your petitioner and divers and sundry other persons not named therein.

That the ten persons named in said bill were personally served with process and summons, but your petitioner was not named therein, and was not served with notice of said suit other than a general notice by publication in a newspaper, although he permanently resided and had his domicil in the Chickasaw Nation, Indian Territory, and within the reach of the process of said court.

And your petitioner represents that in said suit of the Choctaw and Chickasaw Nations against J. T. Riddle *et al.*, the defendants named in the bill filed therein appeared and demurred to said bill, and that their demurrer by said court was overruled and denied, and that thereupon they filed an

answer to said bill wherein they denied that notice of the proceedings in the court of the Central and Southern Districts to both the Choctaw and Chickasaw Nations was indispensable to the validity of the judgments rendered by said courts, and denied that a trial of said causes in said courts *de novo* was such an irregularity as made said judgments invalid or void; that said Citizenship Court on December 17, 1902, in said cause, entitled and styled "The Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle *et al.*," and numbered No. 1 on the docket of said court, held that the judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory, in favor of the defendants named in said bill in equity and all those not named but similarly situated were void, and held that notice to each of the Choctaw and Chickasaw Nations or Tribes of Indians of the proceedings in the United States Courts in the Indian Territory, acting under the Act of June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens in the Choctaw or Chickasaw Nations respectively, was indispensable; and that the proceedings and trial of said cases *de novo*, in said courts rendered said judgments void and on said date, to wit, the 17th day of December, 1902, said Citizenship Court, in said cause No. 1, entitled and styled as aforesaid, ordered, adjudged and decreed that all of said judgments, decrees and decisions rendered by the United States Courts in the Indian Territory, acting under the Act of Congresss approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations, respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill in said proceeding, as well as those who have come in and made themselves parties thereto, and the judgments rendered, as aforesaid, in favor of all persons similarly situated, by said decree of said Citizenship Court

and by the express terms of the decree were attempted to be set aside, annulled, vacated and held for naught.

That petitioner was not a party defendant in said proceedings in said Citizenship Court and did not appear or answer therein in person or by attorney.

That Julia London and others filed an answer in said cause in said Court and denied that said Choctaw and Chickasaw Citizenship Court had the power or jurisdiction to inquire into and pass upon the validity of said judgments sought to be cancelled, as aforesaid, under and by virtue of the terms of said treaty.

But petitioner states that said plea to the jurisdiction of said court was by said court overruled and denied. A copy of said answer is hereto annexed, marked "Exhibit C," and made a part hereof, and a copy of the original decree of said Citizenship Court is hereto annexed, marked "Exhibit D," and made a part hereof, and a copy of the amended decree of said court is hereto annexed, marked "Exhibit E," and made a part hereof.

Your petitioner further represents and shows to this honorable Court that under the terms of said treaty your petitioner cannot review the decision of said Citizenship Court by Appeal or Writ of Error, and under no other law can he review same by appeal or writ of error, and that the effect of said decision is to destroy the validity of the judgment of petitioner recovered in the United States Court, as aforesaid, and that said Citizenship Court is about to certify to said decree by it rendered, and deliver same to the said Commission to the Five Civilized Tribes for its observance, which will in effect prevent said Commission from enrolling the name of petitioner as a member of the tribe of Chickasaw Indians, and thereby destroy the property rights of this petitioner, as aforesaid.

Wherefore, your petitioner states that the said Citizenship Court had not the power or jurisdiction to render, and acted

under an assumed jurisdiction in rendering said decision, in said cause against J. T. Riddle *et al.*, as aforesaid, for the following reasons:

1st. Because said section 31 of said treaty, *supra*, is unconstitutional in that it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction.

2. Because at the date of the passage and ratification of said treaty both the questions of law named therein had been submitted to, passed upon and adjudicated by courts of competent jurisdiction in a controversy between the same parties, as hereinbefore shown.

3d. Because under section 31 of said treaty decrees rendered by the United States Courts of the Central and Southern Districts of the Indian Territory, upon appeal from the Dawes Commission, have been by said Citizenship Court set aside, cancelled and held for naught because *notice* of the proceedings in said court had not been given to both the Choctaw and Chickasaw Nations prior to the rendition of said decrees; whereas decisions rendered by the Dawes Commission, under Act of June 10, 1896, admitting persons to Choctaw or Chickasaw citizenship with *notice to one* of said nations only and *not to both* are binding upon both said nations, and petitioner therefore says said section 31 discriminates between persons in exactly the same status and is class legislation and unconstitutional.

4th. Said section 31 of said treaty attempts to confer upon said Citizenchip Court the power to set aside and cancel judgments in favor of petitioner and others without notice to those to be affected thereby, and attempts without process of law to destroy said judgments and the petitioners' property rights.

Wherefore, and by reason of the premises aforesaid, your petitioner prays:

First. That this honorable Court do grant to him a writ of certiorari directed to said Choctaw and Chicasaw Ciitizenship Court, and each of the judges thereof, and James B. Cassada, the clerk of said court, commanding and requiring them to at once forward to and file with the clerk of this honorable court in this proceeding, a true and correct copy, under the seal of the clerk thereof, of all the pleadings, evidence, judgments, orders and decrees, and the opinion of said court, filed or lodged with said clerk, or recorded upon the journals of said Choctaw and Chickasaw Citizenship Court in said cause No. 1, lately pending on the docket of said court and entitled and styled the Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle *etal.*

Second. And by reason of the premises aforesaid, your petitioner prays for a writ of prohibition against the said Choctaw and Chickasaw Citizenship Court, and all the judges thereof, prohibiting and restraining it, and each of said judges from giving further effect to the decree rendered by said Court, as aforesaid, and prohibiting and restraining said court and each of the judges and the clerk thereof from certifying and delivering to the said Dawes Commission a copy of said decree for its observance and prays for such other and further relief to which he may be entitled.

See Petition, pp. 11 to 20, and Exhibits "B," "C," "D" and "E" attached thereto.

The opinion of the Choctaw and Chickasaw Citizenship Court rendered by it in the case of the Choctaw and Chickasaw Nations or Tribes *vs.* J. T. Riddle et al., under section 31 of said supplemental treaty, has been printed in pamphlet form, and in this opinion said court had attempted to assign reasons for the judgment by it rendered in said court of which petitioner complain. We lodge with the clerk of this honorable court a copy of this opinion, and invite the court's attention to the reasons assigned therein for rendering said judgment. We attempted to have this opinion

authenticated by the certificate and seal of the Clerk of the Court. On February 14, 1903, in the city of South McAlester, Indian Territory, Mr. C. L. Herbert, of counsel for petitioner, called at the office of Mr. James B. Cassada, Clerk of said Citizenship Court, and requested him to authenticate a copy of said court's printed opinion, which he declined to do until he had conferred with Judges Foote and Weaver, two of the three judges composing the court; after leaving his office he returned and stated to Mr. Herbert that in his opinion the said opinion of the Citizenship Court was no part of the record, whereupon Mr. Herbert went in person to see Judges Foote and Weaver (Judge Adams being absent), and advised them of the clerk's refusal to authenticate the document, and was advised by said Judges that the opinion of the court in their opinion was no part of the record in said cause, and they did not think the clerk authorized to certify to it. After trying to argue the question with the Judges stated, and, failing to convince them that the opinion of the court was a material part of the record, Judge Foote suggested that a written stipulation might be procured from counsel representing the Choctaw and Chickasaw Nations, under which the said printed opinion would be recognized as the correct opinion by the court rendered. Acting upon the suggestion, counsel requested Mr. Melville Cornish, of counsel for said nations, to enter into a stipulation whereby the authentication of said opinion would be waived, but Mr. Cornish declined to enter into the agreement, because he said it was a "very extraordinary case." The printed copy filed with the clerk is a true and literal copy of the opinion of said court rendered by it, and, if need be, counsel for petitioner will verify the above statement and make oath that the copy lodged with the clerk is the opinion of said court, admitted so to be by both Judges Foote and Weaver and by counsel for said nations. Quoting from the said opinion of the Choctaw and Chickasaw Citizenship Court,

pp. 10–11, the learned Court said:

> "It will be seen, by reference to *Section 31* of the said act, set out in the statement of the case, that so far as this suit is concerned, this Court is limited to the consideration of *two legal propositions*, and two alone, and it is expressly confined to these two propositions, to wit: Whether, under the Act of Congress, approved June 10, 1896, *notice* to *each* of said nation was *indispensable:* and, second, whether or not the proceedings had in the United States Courts in the Indian Territory, under said act of *June 10, 1896*, should have been confined to a review of the acts of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission. The pleadings and arguments admit there was but *one* nation served with notice, and also that the trials were *de novo.* Then we come to the consideration of the question, was it *indispensable*, under the act of June 10, 1896, to give *both* nations notice, and should the trials have been *de novo*, or confined to the action of the Dawes Commission:"

On the question of *notice*, after reviewing the creation, and the purpose of creating the Dawes Commission, and after rehearsing treaties between the Federal Government and the Choctaw and Chickasaw Indians, to show that the members of the tribes of Choctaw and Chickasaw Indians were and are joint tenants, or tenants in common, of the estate known as the Choctaw Nation and the Chickasaw Nation, the learned Citizenship Court, on page 27 of its printed opinion, say:

> "Here is a large body of land belonging to these two tribes. Congress, in its various acts, *supra*, said that it desired to allot this lands in severalty. Was the Choctaw Nation interested in who was made a

Chickasaw citizen? Or was the Chickasaw Nation interested in who was made a Choctaw citizen?

Most assuredly it seems to us that they were. The natural effect of these judgments was to deprive them of a part of their lands. Then, under the well-established principles of law, was it not necessary, when the applicant came and presented his application and an allowance of same, putting him on the rolls, had the effect of his sharing in the distribution of these lands? Then, naturally, why was he not interested in these proceedings so vital to his rights?"

After discussing the *de novo* question the learned Citizenship Court, in its opinion (page 44), say:

"In the determination of the question raised by the pleadings in this proceeding, we have confined ourselves to the two legal propositions raised by the bill, in accordance with section 31 of the Act of July 1, 1902, under which this proceeding was instituted, deeming it unnecessary to go into the other questions that are raised by the several answers, because we consider a determinatlon of the two propositions as decisive of all. So, in consideration of all the various aspects of the case, and being of the opinion that owing to the manner *in which the lands are held by the two tribes, notice to both tribes was indespensable;* and being further of the opinion that proceedings in the United States Courts in the Indian Territory, under the Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes upon the papers and evidence submitted to such Commission, and should not have extended to trials *de novo* of the questions of citizenship, we are of the opinion, on account of the errors pointed out, that the

> judgments rendered by the United States Courts for the Indian Territory, under the Act of June 10, 1896, upon appeal from the Commission to the Five Civilized Tribes, in favor of the *ten defendants named in the bill* as well as to those who have come in and made themselves parties defendant, and all persons so situated, should be annulled and vacated, and it is, therefore, so ordered."

Admitting that the Act of Congress conferred upon the Citizenship Court the power to inquire into the two *law questions* therein named, and to re-open final judgments rendered by courts of co-ordinate jurisdiction, is it constitutional and due process of law for said court, without service upon petitioner, and without naming him in the bill or the judgment, to enter up a decree cancelling and annulling the judgment in his favor, rendered in March, 1898, by the United States Court for the Southern District of the Indian Territory, pursuant to the Act of Congress, June 10, 1896, *supra?*

If the judgment which we are pleased to call an *omnibus* judgment, rendered against Joins, without naming him, and without service of processs upon, and without his voluntary appearance in the case of Choctaw and Chickasaw Nations *vs.* Riddle *et al.*, and under the terms of which the judgment in favor of Joins, rendered by the U. S. Court for the Southern District of the Indian Territory, is cancelled is to be treated as an action *in personam*, then we submit the rendition of the judgment against him was not due process of law and was void, and that section 31 of the treaty, under which the procedure was had, was, and is, void. That the proceedings to set aside, cancel and annul the judgment in his favor, was an action *in personam*, we have no doubt, and therefore assume that counsel for respondents cannot but assent to this proposition.

In Penoyer *vs.* Neff, 95 U. S., 726, speaking through Mr. Justice Field, this honorable Court said:

> "If without personal service, judgments *in personam*, obtained *ex parte* against nonresidents and absent parties, upon mere publication of process, which in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

And after rehearsing the doctrine that the property of a nonresident may be siezed and appropriated in an action *in rem*, this learned jurist said:

> "But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

And again, in the same case, this honorable court said:

"Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the *personal* rights and obligations of parties over whom that court has no jurisdiction do not constitute *due process of law.* Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissable exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to *judicial* proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that *involves* merely a determination of the *personal* liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance * * * As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

In the case of Coirore *vs.* Millandon, 60 U. S. 113, quoting from the syllabus this honorable court said:

"Neither the act of Congress nor the 47th rule of

this court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be effected by such decree, and the objection may be taken at any time upon the hearing in the appellate court."

In Galpin *vs.* Page, 85 U. S. 18 Wall. 368, Mr. Justice Field, speaking for this honorable court, stated the true doctrine to be:

> "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a *personal* judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

> Further: "It is a rule as old as the law, and never more to be respected than now, that no one shall be *personally* bound until he has had his day in court, by which is meant until he has been *duly cited* to appear and has been afforded an opportunity to be heard. Judgment without such ciation and opportunity wants all the attributes of a judicial determination; it is a judicial usurpation and oppression, and never can be upheld where justice is justly administered."

See also Furgeson *vs.* Jones (Oregon), 3 Law Rep., 620, on page 500, Cooley's Const. Lim., 5 Ed., Mr. Cooley has correctly stated the rule:

> "But such notice is restricted in its legal effect, and

> cannot be made available for all purposes. It will enable the court to give effect to the proceedings so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control of the State; but the notice *cannot* be made to stand in the place of process, so as to subject the defendant to a valid judgment against him *personally*. In attachment proceedings, the *published* notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual * * * The fact that process was not personally served is a conclusive objection to the judgment as a *personal* claim, unless the defendant caused his *appearance* to be entered in the attachment proceeding. Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, *due process of law* would require appearance or personal service before the defendant could be *personally* bound by any judgment rendered."

And this learned auther, on page 502, of the same work, in speaking of the the power and jurisdiction of courts of general and special jurisdiction, says:

> "Some courts are of *general* jurisdiction, by which is meant that their authority extends to a great variety of matters, while others are only of *special* and limited jurisdiction, by which it is understood that they have authority extending only to certain specified cases. The *want* of jurisdiction is equally fatal in proceedings of each; but different rules prevail in

showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of *limited* jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by *proper process.*" Citing numerous authorities.

Is the effect of section 31 of the treaty, cited *supra*, and under which the Citizenship Court attempted to proceed unconstitutional, in that it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction? In the case of Stephens *vs.* Cherokee Nation, 175 U. S. 445, this honorable court, speaking through Mr. Chief Justice Fuller, said:

"And while it is undoubtedly true that legislatures cannot set aside the judgment of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a *new remedy* by way of review has been often sustained under particular circumstances," citing Calder *vs.* Bull, 3 Dallas, 356; Sampeyare *vs.* United States, 7 Pet., 223; Freeborn *vs.* Smith, 2 Wall., 160; Garrison *vs.* New York, 21 Wall., 196; Freeland *vs.* Williams, 131 U. S., 405; Essex Public Road Board *vs.* Skinke, 140 U. S., 334.

We submit that section 32 of the treaty is, and that section 31 is not, in keeping with the rule thus announced. Under section 32 appellate jurisdiction is conferred upon the said Citizenship Court over all judgments of the courts in the Indian Territory rendered under said Act of Congress of June 10, 1896, "admitting persons to citizenship or to enrollment as citizens in either of said nations," and under said section said court is authorized under the appellate jurisdiction thus conferred, to "consider, review and revise all such judgments, both as to findings of fact and conclusions of law." Under this section an appellate court is given the power to review the said judgments, but under section 31 it is attempted to confer upon said court original jurisdiction to entertain a suit at the instance of the nations, and pass upon two alleged questions of law, alleged to have existed at the time the judgments sought to be cancelled were rendered by courts of equal dignity and jurisdiction, and made so by the act of June 10, 1896. Should there ever be an end to litigation? Has the Congress the power to confer upon a court of its own creation the right to cancel and nullify final decrees and judgments of courts of co-ordinate jurisdiction who have exercised a discretion and a jurisdiction given to them by former Acts of Congress? Is it not a fundamental principle that there shoud be harmonious action in the courts, and that one court should not usurp the powers of another? Is it not also a fundamental principle of this Government that a judgment shall not be annulled, vacated or set aside by other courts except for fraud in the procurement thereof? We most respectfully submit these questions must be answered in the affirmative. See United States *vs.* Throckmorton, 98 U. S., 61.

In the case of U. S. *vs.* Throckmorton, cited, *supra*, this honorable Court, speaking through Mr. Justice Miller, said:

"There are no maxims of the law more firmly

established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicæ' ut sit finis litium* and *nemo debet bis vexori pro una et edam causa.*

"If the court has been mistaken *in the law* there is a remedy by writ of error. If the jury has been mistaken in the facts the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the *same* proceeding, relief is given in the *same suit*, and the party is not vexed by another suit for the same matter. So in a suit *in chancery*, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final a *bill of review* on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the *same suit*, and the rule framed for the repose of society is not violated."

Again, quoting from the same opinion, it is said:

"In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been *prevented* from presenting *all* of his case to the court,"

and quoting from Wells on *Res Adjudicata*, section 499, the court say:

> "Likewise there are few exceptions to the rule that equity will *not* go behind the jndgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant in presenting the defense in the legal action."

We invite the court's attention to the doctrine announced in the Throckmorton case. See also Henderson *vs.* Bradley, 29 C. C. A., Rep. 303.

Is not said section 31 of said treaty class legislation and unconstitutional and void for that reason? It must be observed that under the Act of June 10, 1896, all persons who applied to the Commission to be enrolled as Chocktaws or Chickasaws and gave notice to *one* and *not both* said Nations of his said application, and whose application was granted by the Commission, and no appeal taken therefrom to the United States Court, his *status*, as thus fixed by the Commission cannot be interfered with or enquired into by the Citizenship Court on account of either of the questions of law named in said section 31, whereas, the applicant in exactly the same status, whose case may have been appealed by the Nation to the court, and by the court his status judicially enquired into and fixed by the court's decree, is to have his final decree cancelled by the omnibus judgment attempted to be rendered by the Citizenship Court December 17, 1902. Under this section the Citizenship Court is not given the power to enquire into the question of notice to the tribes of the application to the Commission of persons claiming to be members of the tribes, and the question of notice or no notice is wholly immaterial so far as the said section 31 is concerned. If he who answers an appeal of the Nation or himself appeals from the decision of the Commission and by the court is decreed to be a member of the tribe, then by the omnibus decision of the Citizenship Court under said section his status is to be destroyed.

In the case of the Bank of the State *vs.* Cooper, 24 Am. Dec., 517, the Supreme Court of Tennessee said:

> "By the law of the land is meant a general and public law operating equally on every individual in the community. Such is the opinion of Judge Caton in the case before referred to, and such was the opinion of Lord Coke upon the consideration of Magna Charter. In his commentaries on this instrument he says that the terms 'law of the land' were used that the law might extend to all, and he informs us that Parliament, by the act in the eleventh year of Henry VII violated the principles of the great charter in this particular, and that under the authority of this act Empson and Dudley committed horrible oppressions and exactions to the undoing of many people. But that in the first year of Henry VIII this act was repealed on the avowed ground that it was a violation of the charter. And the ill success hereof (he adds) and the fearful end of these two oppressors should deter others from committing the like, and would admonish parliaments that instead of the ordinary and precious trial *per legeni teræ*, they bring not in absolute and partial trials by discretion."

Upon which the Supreme Court of Tennessee remark:

> "If the construction here contended for be not the true rule, it seems to me that an edict in the form of *legislative enactment*, taking the property of A, and giving it to be, might be regarded as the law of the land, and not forbidden by the constitution; but such a proposition is too absurd to find a single advocate. This provision was introduced to secure the citizens against the abuse of power by the government. Of what benefit is it, if it impose no res-

> traint upon legislation? Was there not as just ground to apprehend danger from the legislative as from any other quarter. Legislation is always exercised by the majority. Majorities have nothing to fear, for the power is in their hands. They need no written constitution defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of the minority. They are in danger. The power is against them, and the selfish passions often lead us to forget the right. Does it not seem conclusive, then, that this provision was intended to restrain the legislature from enacting *any law* affecting injuriously the rights of any citizen, unless at the same time the rights *of all persons* in similar circumstances were equally affected by it. If the law be general in its operation, affecting all alike, the minority are safe, because the majority who make the law are operated on by it equally with the others."

The petitioner further insists that at the date of the treaty, *supra*, both the questions of law named therein had been submitted to, passed upon and adjudicated by courts of competent jurisdiction in controversies between the same parties.

In the case of Stephens *vs.* Cherokee Nation, 174 U. S. 445, this honorable court said:

> "These appeals are from decrees of the United States Court in the Indian Territory, sitting in first instance, rendered in cases pending therein involving the right of various individuals to citizenship in some one of the four tribes named, most of them came to that court by *appeal* from the action of the so-called Dawes Commission, though some were from decisions of tribal authorities. * * * The

act of June 10, 1896, provided that if the tribe or any person be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the *appeal* shall be taken within sixty days, and the judgment of the court shall be final. * * * Since it is *objected* in the *outset* that no *appeal* from the decisions of the Dawes Commission or of the tribal authorities could be granted to any United States Court; and, furthermore, that at all events it was not competent for Congress to provide for an appeal from the decrees of the United States Court in the Indian Territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute. As to the *first* of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of *commissions* and *boards* created by it, exercising only *quasi* judicial powers, by the *transfer* of their proceedings and decisions, denominated *appeals* for want of a better term, to judicial tribunals for examination and determination *de novo*, and as will be presently seen, could certainly do so in respect of the action of tribal authorities."

We therefore respectfully submit the *de novo* question was passed upon and settled by this honorable Court in the Stephens case prior to date of the said treaty creating the Citizenship Court.

Quoting further from the Stephens case this court said:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of

> the Government, nor can the act be properly regarded as destroying *any vested right*, since the right *asserted to be vested* is the *exemption* of these *judgments from review*, and the mere *expectation* of a share in the *public lands* and moneys of these tribes, *if hereafter distributed*, if the applicants are admitted to citizenship, *cannot be held to amount to an absolute right of property* that the original cause of action, *which is citizenship or not*, is placed by the judgment of a lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

And in the Stephens case, *supra*, this court said:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between *admission to citizenship* merely and the *distribution of property* to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of the acts in respect of the *determination of citizenship* cannot be successfully assailed *on the ground of the impairment or destruction of vested rights.* The lands and moneys of these tribes are *public* lands and *public* moneys, and *are not held in individual ownership*, and the assertion by any particular applicant that his *right* therein is *so vested* as to preclude inquiry into his *status* involves a contradiction in terms."

After quoting from the Stephens case, this honorable Court, in the case of Cherokee Nation *vs.* Hitchcock (decided October 23, 1902, and reported in Adv. Sheets Law, Cop. Pub. Co., January 15, 1903) said:

> "The *holding* that Congress had power to provide a *method* for *determining membership* in the Five Civilized Tribes, *and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members*, necessarily involves the further holding that Congress was vested with authority to adopt measures to make the tribal property productive and secure therefrom an income for the benefit of the tribe. Whatever *title* the Indians have is *in the tribe*, and *not* in the *individuals*, although held by the tribe for the common use and equal benefit of all the members."

To the same effect see later case of this court, Lone Wolf *vs.* Hitchcock, reported page 216, *et seq.*, Adv. Sheet Law, Co-op. Pub. Co., February 1, 1903.

The doctrine of *res adjudicata* is so firmly embedded in our system of jurisprudence, as to make it one of the fundamental principles of our government. Any act of Congress, which undertakes to unsettle judgments that have become final, is violative of the provisions of the Constitution of the United States requiring "due process of law," for the reason that, when the Constitution was adopted, with its various amendments, it inherently embraced within its provisions certain well-known and fundamental maxims of the common law. Section 500, of the second volume of Black on Judgments.

It is stated that:

> "The solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest. It is more than a mere rule of law. It is more

> even than an important principle of public policy. It is not too much to say that this maxim is a fundamental concept in the organization of every jural society."

This rule is founded upon the principal that there must be an end to litigation. If Congress had the right to open these judgments in the manner in which it did, it clear that another Act of Congress may be passed authorizing some other court to set in judgment upon the action of the Citizenship Court, and thus on *ad infinium.*

The doctrine of *res judicata* applies also to bills of review as well as to the trial in the first instance. That is to say, there can be but one bill of review in each case. We have shown that in the Goodall case, a "bill of review" was filed in the United States Court for Southern District of the Indian Territory which raised the very question of notice that has been decided by the Citizenship Court. This action is now pending in and undetermined by the Court of Appeals of Indian Territory. The doctrine of *res judicata* applies as much to the bill of review as to the original trial, and the Indian governments having failed to prevail in their bill of review, we do not believe that Congress has the right to permit a second bill of review for the purpose of testing this question. Besides, the Act of Congress does not authorize what is, technically speaking, a "bill of review." It authorizes an independent court to entertain an original suit for the purpose of vacating the judgment of another court. This, in our judgment, is violative of the constitution.

In the first volume of Black on Judgments, sections 297 and 298, the doctrine is clearly announced, that

> "The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the

> court which rendered the judgment, and to that court and no other application to set aside the judgment, should be made * * * The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how, or for what causes, it cannot apply retrospectively to a judgment already rendered, and which had become final and unalterable by the court before its passage."

Counsel for the Choctaw and Chickasaw Nations have filed a brief herein in opposition to the motion of petitioner, and say the petition for prohibition and for *certiorari*, should not be filed persuant to said motion.

1st. Because the Choctaw and Chickasaw Citizenship Court in rendering the judgment complained of proceeded in strict conformity to the Act of Congress, or treaty referred to.

2d. Because it appears from said petition said legislation was enacted, and said court created by Congress in the exercise of its power in administering the affairs of the Choctaw and Chickasaw Nations and its constitutional.

3d. Because it appears from the petition that the proceedings in said court in said cause complained of ended by the final judgment of the court, and that nothing remains by the court in respect thereto.

4th. Because the acts of said court are political and not judicial, and its acts cannot therefore be inquired into by this honorable court.

In support of this contention they have cited the decisions of this court to the effect that the Congress of the United

States possess legislative power over treaties with Indians, and Indian tribal property, etc., but we most respectfully insist that when Congress by the act of June 10, 1896, conferred upon the Dawes Commission and the United States Courts in the Indian Territory the right to pass upon the claims of those asserting a right to Indian citizenship, that by such Act of Congress conferred upon the tribunal designated in the act the power to judicially pass upon and determine such questions to be submitted, and that by a subsequent Act of Congress the adjudications of the said tribunal cannot be obliterated nor inquired into, except in the usual and ordinary way.

The power of Congress to designate a commission, board or court to make up a roll of Indian citizenship is not questioned, but when the court thus designated have inquired into, passed upon and adjudicated the questions to it relegated by said act of Congress, the power of Congress to destroy such decrees on the ground that the acts of the court are political is seriously questioned. No case cited, and we have discovered none which goes to the extent of saying acts of the judiciary pursuant to an act of Congress are political, because forsooth, the Congress had the right to settle the same questions through the executive branch of the Government.

We most respectfully submit there can be nothing in this contention of counsel worthy the serious consideration of this honorable court.

Counsel, in their brief, also insist that the writ of prohibition should not be allowed, because the test case of the Citizenship Court decided by it December 17, 1902, under said section 31 of said treaty; that the law does not require the exercise of further jurisdiction by said court as regards the power conferred by said section 31; that the case thus decided is finally ended, and a writ of prohibition could not, therefore, issue to said court.

We submit the rule to be, if it appears upon the *face* of the proceedings that the court below had no jurisdiction, a prohibition may issue at any time, either before or after judgment and sentence, because it is a nullity; it is *coram non judice*.

Lloyd's Law of Prohibition, p. 13.
In re Hugudey Mfg. Co., 184 U. S., 549, 2 ed., Bat., p. —.

And we submit the writ of prohibition is a proper remedy where an inferior court either entertains a proceeding in which it has no jurisdiction, or where, having jurisdiction, it assumes to exercise an unauthorized power.

Hawes Jurisdiction of Courts, Sec. 156.
High Ext. Leg. Rem., 767.
Thompson *vs.* Tracey, 60 N. Y., 34.
Appo *vs.* People, 20 N. Y., 540.
Sweet *vs.* Hulburt, 51 Barb, 314.
Coker *vs.* Supreme Court, 58 Cal., 177.
Zyesta *vs.* Charleston, 1 Bay., 387.
State *vs.* Mitchell, 2 Ball, 228.

We have lodged with the clerk of this court a certified copy of the record and briefs of counsel in the case of Dukes *et al. vs.* Goodall *et al.*, now pending in the United States Court of appeals for the Indian Territory referred to, *supra*, and which shows that the question of notice had been passed upon by the United States Court for the Southern District of the Indian Territory, adverse to complainants, and the cause had been appealed to said appellate court (where it is now pending), prior to the date of the treaty, in which section 31 attempts to reopen the question of notice.

We do most earnestly insist that section 31 of said treaty is unconstitutional and void and conferred upon the said Choctaw and Chickasaw Citizenship Court no power or

jurisdiction to set aside and cancel the judgment in favor of petitioner and others—and especially petitioner as he has not had his day in court; has not been served with process, is not named in the bill of complaint, the judgment or other proceeding in said court, and for the reasons stated in the petition, and the motion for permission to file the same, and in this brief we respectfully request that the petitioner be allowed to file his said petition, and that the prayer for relief therein prayed for be granted.

WILLIAM I. CRUCE,
C. L. HERBERT,
Counsel for Petitioner, U. S. Joins.

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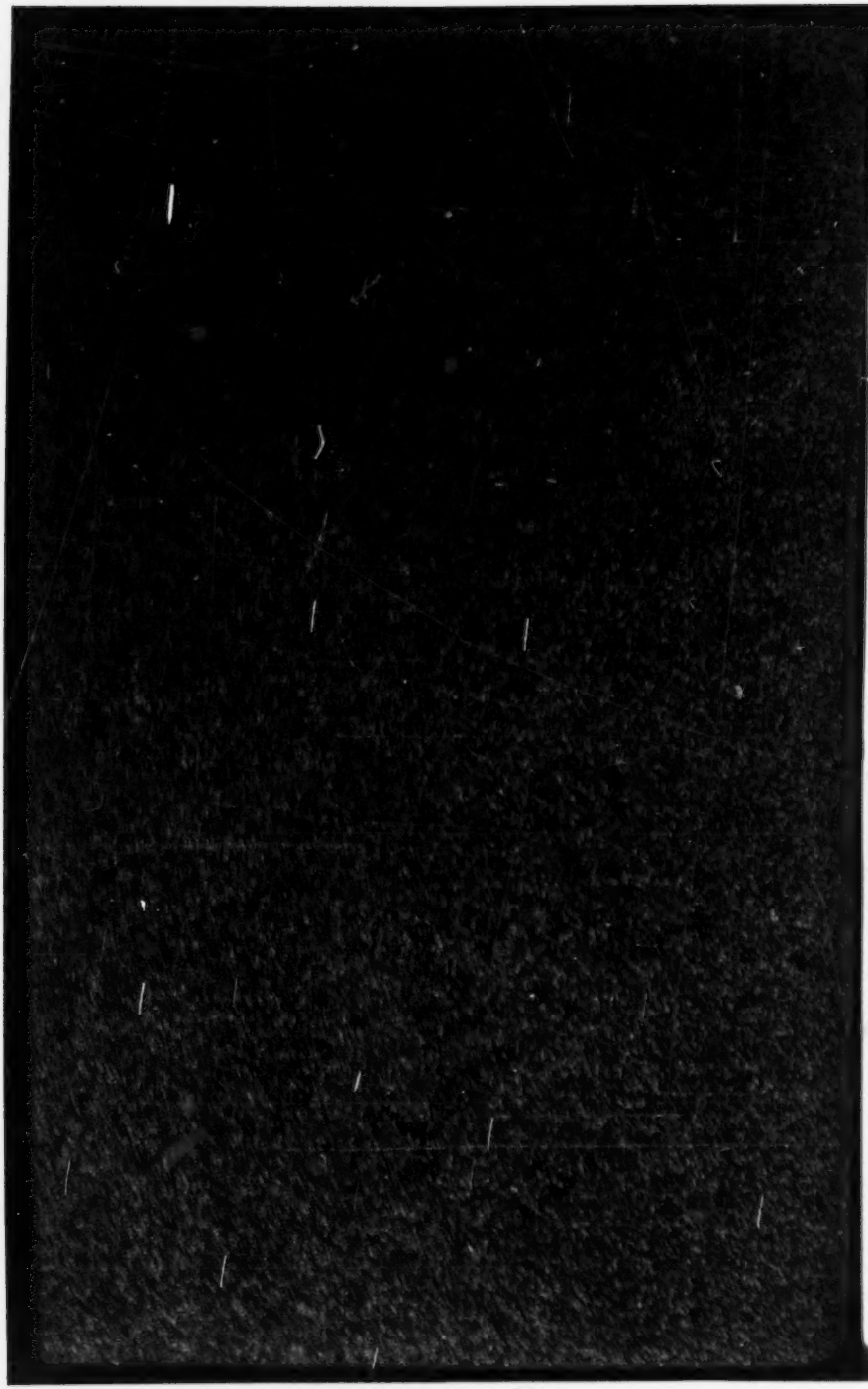

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 14—Original.

Ex Parte: IN THE MATTER OF U. S. JOINS,

PETITIONER.

Petition for Writs of Prohibition and Certiorari to the Choctaw and Chickasaw Citizenship Court.

Supplemental Brief and Reply Brief of Petitioner to Briefs Filed Respectively by the United States and by the Choctaw and Chickasaw Nations in Opposition to Petition for Writs of Prohibition and Certiorari.

Statement.

On March 23, 1903, this Honorable Court granted petitioner's motion to file petition for writs of prohibition and certiorari against the Choctaw and Chickasaw Citizenship Court, and each of the judges and the clerk thereof, and on that day made a rule against said court, and each of its judges and the clerk thereof to show cause October 19, 1903, at 12 o'clock, noon, or as soon thereafter as counsel can be heard, why writs of prohibition and *certiorari* should not be granted as prayed in the petition.

Each of the judges and the clerk of said Citizenship Court has been duly served with a copy of said petition and the rule to show cause. Prior to March 23, 1903, the Choctaw and Chickasaw Nations, by their counsel, filed herein reply and brief in opposition to petitioner's motion for leave to file the petition. In this reply none of the material allegations in the petition are denied. The record shows that on the 24th day of August, 1903, the judges and the clerk of said Citizenship Court filed herein what is termed a "Reply, Answer and Return to the Rule and Order to them issued, to show cause why writs of prohibition and certiorari should not be granted against them as prayed for by the petitioner." This reply was not printed and counsel did not receive a copy thereof and did not know of its existence until October 15, 1903. In this reply the respondents do not attempt to deny any of the material allegations of the petition, but in effect admit them to be true. They state, first, that when the petitioner applied to this honorable court for permission to file a petition for writs of prohibition and *certiorari*, that they had previous thereto rendered the judgment of which petitioner complains, in the case of Choctaw and Chickasaw Nations *vs.* J. T. Riddle *et al.*, under Section 31 of the Act of Congress of July 31, 1902 (32 Stats. at L., 641), and had certified said judgment to the Commission of the United States to the Five Civilized Tribes (known as the "Dawes Commission"), and as the judgment so rendered was self-executing, the case had passed beyond the jurisdiction of the Citizenship Court and was at an end.

2. They state petitioner, by acts by him done subsequent to the institution of the prohibition proceedings herein, has estopped himself from questioning the jurisdiction of the Citizenship Court in the Riddle case, and estopped himself from denying the constitutionality of Section 31 of the Act of Congress, *supra.*

3. They say, inasmuch as the members of the tribes of Choctaw and Chickasaw Indians, at an election held September 25, 1902, by a majority vote ratified the said Act of Congress creating said Citizenship Court; and, inasmuch as petitioner *claims* to be an *Indian*, he is bound by said Act of Congress because of its ratification by votes of Choctaws and Chickasaws whose rights as members of the tribes had not been questioned. October 10, 1903, the Solicitor General, in behalf of the United States, filed a brief herein in opposition to the petition. In this brief he makes a statement of the history of the litigation which, in substance and in the main, is admitted to be correct. The last-named brief was not received by counsel for petitioner until October 16, 1903. This supplemental brief and brief in reply, with permission of this honorable court, is filed and is intended as an additional brief to brief heretofore filed by petitioner and as a reply brief to briefs filed herein by the United States and the Choctaw and Chickasaw Nations, as stated.

1st. Has this honorable Court the jurisdiction and power to grant the writ of prohibition as prayed for?

"The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party." (*Sec. 688, p. 127, Rev. Stat. U. S.*)

Concerning the jurisdiction of this Court to grant writs of prohibition, in Smith *vs.* Whitney, 116 U. S., 173, speaking through Mr. Justice Gray, this honorable Court said:

"It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject

of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right, and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities. *In re* Forster, 4 B. & S. 187, 199; Mayor, &c., of London *vs.* Cox, L. R. 2 H. L., 239, 280; Worthington *vs.* Jeffries, L. R. 10 C. P., 379, 380; Chambers *vs.* Green, L. R. 20 Eq., 552, 555. See also Weston *vs.* City Council of Charleston, 2 Pet., 449, reversing on error S. C., Harper, 340."

In re Rice, Petitioner, 155 U. S., 402, speaking for the Court, Mr. Chief Justice Fuller said:

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy of appeal or otherwise, or where the question of jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings." Citing Smith *vs.* Whitney, 116 U. S., 167, 173; *In re* Cooper, 143 U. S., 472, 495.

Again, in *In re* New York and Porto Rico Steamship Co., petitioner, 155 U. S., 523, 531, Mr. Chief Justice Fuller said:

"We have recently thus stated the principles applicable to the issue of the writ of prohibition, in *In re* Rice, *ante*, 396, 'where it appears that the court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. Smith *vs.* Whitney, 116 U. S., 167, 172; *In re* Cooper, 143 U. S., 472, 495.'

"Without reviewing the action of the district court on its merits, it certainly cannot be said that that court was clearly without jurisdiction, or that petitioners were without other remedy; for in the event of a decree against them, they could appeal directly to this Court on the question of jurisdiction or to the Circuit Court of Appeals upon the whole case, and that court might certify the question to this Court for decision. *Ex parte* Morrison, 147 U. S., 114, 126; United States *vs.* Jahn, 155 U. S., 109."

Section 1, Article 3, of the Constitution of the United States reads:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.
* * *

"Sec. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws

of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such *exceptions*, and under such regulations as the Congress shall make."

Prohibition is a common law writ, and is designed to prevent excess of jurisdiction on the part of the court assuming to exercise same, and we submit will issue in all cases when the court against whom it is directed acts wholly without jurisdiction, or exceeds its jurisdiction.

In re Cooper, 143 U. S., 472.
In re Morrison, 147 U. S., 33.

Section 688 of the Revised Statutes, copied *supra*, was not intended to confine this Court, in the exercise of jurisdiction in prohibition proceedings to proceedings against district courts when proceeding as courts of admiralty and maritime jurisdiction, but was intended to establish simply the practice and procedure of the court in prohibition proceedings against the district courts sitting as courts of admiralty or exercising maritime jurisdiction.

Section 2, Article 3, of the Federal Constitution makes it clear that this honorable Court can properly exercise appellate jurisdiction of all cases therein mentioned, except

those of which the Court is given original jurisdiction, and except such cases as Congress shall except from the rule.

The writ of prohibition applied for in this case arises under a treaty made between the United States and the Choctaw and Chickasaw tribes of Indians, and clearly fall within the purview of Section 2, Article 3, of the Constitution. The writ applied for is a common law writ, and as its issuance has not been prohibited by act of Congress, it goes without saying this honorable Court has the power and jurisdiction to entertain the petition filed therefor—especially since it is sought by the writ to prevent the effect of a void judgment rendered by a court created by treaty or act of Congress.

If relief cannot be had in this way from this Court, then the petitioner is without a forum wherein the wrongs and grievances of which he complains can be adjusted. There is no court under the law to which the case could be presented by appeal or error. He must submit to the cancellation of the judgment he obtained in a court of competent jurisdiction—and upon which judgment he has relied and by reason of which he has expended large sums of money, just because the legislative branch of the Government by judicial legislation has attempted to grant the Chickasaw Nation a new trial through the agency of the Choctaw and Chickasaw Citizenship Court. We had not considered the question of this Court's jurisdiction to grant the writ as a serious one, and discuss the question at length, because counsel for respondents in briefs heretofore filed have attempted to raise the question. To our minds, in view of the recent decisions of this Court, and the modern English decisions, some of which the Court have cited, the question of this Court's jurisdiction is not an open one, but that it is now well settled that when the inferior court without jurisdiction, or under an

assumed jurisdiction, renders and causes to be entered a judgment from which the aggrieved party has no remedy by appeal or writ of error (as in this case) that this honorable Court, upon proper application, will grant the writ of prohibition to prevent the effect of the void judgment so rendered.

Second. Is Section 31 of the Act of Congress of July 1, 1902 (32 Stat., 641), unconstitutional, as alleged by petitioner, because of its judicial nature, and because, as alleged, it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction?

The first act of Congress which was decided to be unconstitutional was that of March 23, 1792 (1 Stat. at Large, 243), requiring circuit courts of the United States to examine into the claims of the officers, soldiers and seamen of the Revolution to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability, and to certify their opinion to the Secretary of War. The act authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the Court, and to report the case to Congress at its next session. The question was never reported to the Supreme Court *in banc*, but the concurrent opinions of Chief Justice Jay and Justices Cushing, of the Supreme Court; of Duane, District Judge of the New York Circuit; of Justices Wilson and Blair, of the Supreme Court; of Peters, District Judge of the Pennsylvania Circuit; of Justice Iredell, of the Supreme Court, and Sitgreaves, District Judge of the North Carolina Circuit, were all to the effect that the act required of them was not a judicial one, because subject to the revision of the Secretary of War and Congress. These opinions were communicated to the President and to Congress, resulting in the repeal of the act at the next session of Congress. The

judges of the courts mentioned *supra* addressed letters to the President of the United States, pointing out the unconstitutionality of the act. They stated the "business directed by the act was not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States, and because if upon that business the Court had proceeded, its judgments might, under the same act, have been revised and controlled by the Legislature and by an officer in the Executive Department." Such revision and control by the judges was deemed radically inconsistent with the independence of that judicial power which is vested in the courts, and consequently, with that important principle which is so strictly observed by the Constitution of the United States.

It was further stated:

"That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the *decision* of the court is not made *final*, but may be at least suspended in its operation by the Secretary of War if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a *mode of revision* which we consider to be unwarranted by the Constitution; for though Congress may certainly establish, in instances not yet provided for, courts of *appellate* jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of Secretary of War is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachment."

See Hayborn's Case, 2 Dallas, 409.

In ex parte Garland, 4, Wall., 333, this honorable Court in effect held that the admission by the Court of petitioner, Garland, to practice therein was a judicial act, and that the Act of Congress of January 24, 1865, providing that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after March 4, 1865, to the bar of any circuit or district court of the United States, or Court of Claims, until a certain oath therein mentioned had been taken, was unconstitutional on the ground that said act was tantamount to a legislative decree, and an attempt on the part of the legislature to interfere with the judgment of the Court.

On page 159 of Sedgwick on the Construction of Statutory and Constitutional law (2 Ed.), Mr. Sedgwick advances the following conclusions upon the limits to which judicial legislation should go:

First. "That the legislature is to confine itself to its function of 'making laws'; and we have considered the general features and characteristics of a law. The imperfection of language does not permit us to define with absolute precision the meaning of the term 'law', but each case must depend on its peculiar features."

Second. "That it is the right and duty of the judiciary to repress and confine the legislative body within the true limits of the law-making power; but that they have no right whatever to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice or sound morality."

Mr. Ordronaux, on page 426 of his work on Constitutional Legislation, correctly states the rule to be:

"If a legislative act be made in contravention of the Constitution, it is manifestly no law, and as it is the duty of courts to administer that only which is law, there can

be no choice allowed then in the matter of declaring such a statute to be invalid. They cannot be bound by it, since it is a violation of the paramount law, which being the supreme law of the land weighs with equal force upon all courts alike. Says C. J. Marshall: 'If both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.'"

On page 114, *et seq.*, Cooley's Constitutional Limitations (5 Ed.) it is stated:

"As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law is, or has been, is a judicial power to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial.' If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts

should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted.

"If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is plain it cannot do so directly, by setting aside their judgment compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry. And as a court must act as an organized body of judges, and, where differences of opinions arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members."

In the case of State of Pennsylvania *vs.* Wheeling & Belmont Bridge Co., 59 U. S. (18 How.), 421, on page 431, this honorable Court said:

"But it is urged that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.

"The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of Congress."

In Calhoun *vs.* McLendon, 42 Ga., 405, the supreme court of that State held that an act of the legislature declaring a single person to be the head of a family is judicial

legislation and unconstitutional, because in contravention of the decision of that court defining the head of a family under the State constitution. The decision of the court was held to be paramount.

In the case of Milam County *vs.* Bateman, 54 Tex., 154, quoting from the syllabi, the supreme court of Texas said:

"The Act of July 21, 1870, under which the legislature attempted for the relief of settlers on Milam County school lands, to authorize the issuance of patents in violation of the law, as already decided by the supreme court, was judicial and not legislative and was unconstitutional.

"The legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts in the exercise of their jurisdiction have made; this would not only be the exercise of judicial power, but would be its exercise in its most objectionable form. Such a doctrine would make the legislature a court of review, to which parties might appeal when dissatisfied with the rulings of a court."

In section 31, page 36, Wade on Retroactive Laws, the rule is concisely stated:

"The question whether a statute operates upon past transactions is one peculiarly for judicial determination. A law will not receive a retroactive construction merely because a subsequent statute declares that it was so intended. Whatever force a declaratory statute may have must be prospective with reference to the statute construed. Where it may be legally enacted that an existing statute shall be interpreted so as to affect particular cases not previously included in express terms, such declaratory or expository statute will be inoperative to affect causes arising under the original statute prior to the declaratory act. This rule restricts the operation of statutes declaring the meaning of former enactments to causes arising subsequent to the statute by which the language of the prior act is interpreted, for the reason that an admission of the existence of legisla-

tive control over past controversies by means of statutes declaratory of the meaning of previous laws, would amount to an acquiescense in legislative usurpation of judicial powers. Such a concession would be a most dangerous surrender by one of the several branches of the Government to a co-ordinate branch. The principles upon which this restriction upon legislative authority is based are very ably and comprehensively laid down by Judge Cooley. Says the learned author in this connection: 'It is always competent to change existing law by a declaratory statute, and when the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future.

"'But the legislature cannot be made to act upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts.' It was held, in harmony with the spirit of this doctrine, that an act of the legislature declarative of the jurisdiction conferred by a former statute might take effect and confer the jurisdiction declared to exist, so as to affect future cases, but it would be utterly inoperative upon causes arising between the dates of the two acts. For similar, and perhaps even stronger reasons, would a statute of this nature, which undertook, by declaring the intention of a prior legislative act, to make it retroactive, be regarded as a usurpation of authority by the Legislature."

In Lambston *vs.* Hogan, 2 Pa. St., 22, the supreme court of that State held where an act of the legislature has received a judicial construction, a remedial act will always be construed to extend to future cases, and that the legislature have not the constitutional power, by such acts, to impair or affect rights acquired or existing under such a construction.

In Missouri it is held that a statute decloratory of the meaning of a former statute can have no force or effect as to *past controversies*, but it will control future cases. (McNichol *vs.* The U. S., Mo. Rep. Og., 74 Mo., 457.)

In Denny *vs.* Mattoon, 84 Mass., 361 (79 Am. Dec., 784), it was held that the legislature has no power to validate or confirm insolvency proceedings, which were commenced by petition of creditors, and had before a person claiming to act as judge of insolvency, but with no title to the office, and which have been adjudged invalid by a decree of the highest court of the State.

In Gorman *vs.* Sinking Fund Comrs. (Virginia Coupon Cases), 25 Fed. Rep., 647, it was held by the Circuit Court of the Eastern District of Virginia that where a statute is passed by a legislature declaratory of the meaning of a statute previously passed by that body, such interpretative act cannot be *retrospective* in its operation, and deprive the courts of the power to put their own interpretation upon the original statute and determine rights vested under it prior to the passage of the interpretative statute.

By an act of the Assembly of the State of Maryland (1872, Gh. 310), it was enacted "that the Court of Appeals be and they are hereby authorized and empowered to reopen and rehear." The cases named, "and upon hearing thereof, to pass such judgments, orders and decrees in the said several cases asright and justice may require."

The supreme court of Maryland in passing on this act held it was unconstitutional as an attempt on the part of the legislature to exercise judicial powers. Dorsey *vs.* Dorsey, 37 Md., 64; 11 Am. Rep., 528.

In Griffin's Ex'or, *vs.* Cunningham, 20 Grott. 31, the supreme court of Appeals of Virginia held that the proviso

to Section 2 of the Act of March 5, 1870, called the enabling act, which authorized the Court of Appeals, organized under the present Constitution, to rehear and affirm or reverse the decrees made by the military judges, at its term, commencing the 11th of January, 1870, the term having ended before the passage of the act, is unconstitutional, and the present court has no authority to rehear such cases.

In Teel *vs.* Yancey, 23 Grott., 691, the same court held, that the Act of March 5, 1870, commonly called the Enabling Act, is a valid act, except the proviso which authorizes the Court of Appeals to *review* the decisions of the Court of Appeals organized under the reconstruction acts; and that the district courts of appeal, sitting in December, 1869, had jurisdiction to hear and decide the causes then pending therein.

To the same effect, see Hooker *vs.* Hooker, 18 Miss., 5, 99.

In Oliver *vs.* McClure, 28 Ark., 555, it was held by the supreme court of that State that it is competent for the legislature to change remedies, process, etc., before judgment; but when the right is judicially ascertained, they cannot interfere with the process to enforce that right that materially renders the right less efficient than that in existence when the contract was made.

Has Congress the power to grant a new trial from a judgment which has become final? And by which vested rights have been established and enjoyed—and subject the party in whose favor rendered to the hazard, risk, and expense of a farther hearing, when by the very act which gave the trial court the authority to enter this judgment, it is unequivocally provided that the judgment of that court should be final.

If the legislative branch of the government were permitted to override the judicial—to reopen and retry matters which had once been settled—to make prospective that which had once been final—and at will to disturb the solemnity of a final judgment of a court, then the stability and confidence in the final action of the Judicial Department will forever be shattered.

Vested right. What is? See

Steamship Company *vs.* Joliffe, 2 Wall, 450;
Wade on Retroactive Laws, Sec. 157;
Black on Constitutional Law, Sec. 154;
Lowe *vs.* Harris, 17 S. E., 539;
3 Amer. & Eng. Ency. Law, 758, 2nd Ed.

The case of McCollough *vs.* The Commonwealth of Virginia, 172 U. S., 123, contains the expression from this Court on a question of this character:

"But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the Circuit Court of the City of Norfolk the Act of 1882 was in force, and the judgment was rightfully entered under the authority of that Act. The writ of error to the Court of Appeals of the State brought the validity of that judgment into review, and the question presented to the Court was whether at the time it was rendered it was rightful or not. If rightful, the plaintiff therein had a vested right which no State legislation could disturb. It is not within the power of the legislature to take away rights which have once been vested by a judgment. Legislation may act on subsequent proceedings, but when those actions have passed into judgment the power of the legislature to disturb the right thereby created ceases."

In Hill *vs.* Sunderland, 3 Vt., 570, the Court says:

"The power to open or vacate judgment is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of Government, it cannot be exercised by the

legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how, or for what cause, it cannot apply retrospectively to judgments already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested right of the successful litigant, and, second, because it would be an unwarranted invasion of the province of the Judicial Department."

Black on Constitutional Prohibitions, Section 199, says:

"In accordance with the principles already announced, it is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date impairs vested rights and infringes on the Judicial Department of the Government."

And the following authorities support this proposition:

6 Amer. & Eng. Ency. Law, p. 1038, 2nd Ed.;
Freeman on Judgments, Vol. 1, Sec. 90;
Smith Stat. & Const. Law, Sec. 340;
In re Handley, 49 Pac., 829;
Bush *vs.* Williams, 24 Ark., 96;
Martin *vs.* So. Salem Land, 26 S. E., 591;
Story *vs.* Runkle, 32 Tex., 398;
Denny *vs.* Matton, 79 Amer. Dec., 784;
Penn *vs.* Wheeling, Etc., Bridge Co., 18 How., 421;
Merrill *vs.* Sherburne, 8 Amer. Dec., 52;
Stanford *vs.* Barry, 15 Amer. Dec., 691;
Ratcliffe *vs.* Anderson, 31 Amer. Dec., 716;
Burch *vs.* Newberry, 10 N. Y., 374;
Hewitt *vs.* Colorado Springs, 5 Colo., 184.

Sutherland on Statutory Construction, Section 480, says:

"When a right has been perfected by a judgment, the fruits of recovery cannot be diverted by new legislation, nor

subjected to new hazard by giving a new right to appeal or some other mode of review."

Since the adoption of the 5th Amendment to the Constitution, which declares that no person should be deprived of his property without due process of law, Congress has no greater power to make laws which impair vested rights than is enjoyed by State legislature. See

Wade on Retroactive Laws, Secs. 156, 157, 264;
Black on Const. Prohib., Secs. 176, 183, 207;
3 Amer. & Eng. Ency. Law, pp. 756–760, 2nd Ed.;
Lawson's Rights, Remedies & Practice, Vol. 7, Sec. 3850;
Sutherland on Stat. Construction, Sec. 480.
Steampship Co. *vs.* Joliffe, 2 Wall., 450;
Fletcher *vs.* Peck, 6 Cranch., 87;
Wilkinson *as.* Leland, 2 Peters, 657;
Ferguson *vs.* Williams, 13 N. W., 49.

The case of Watson *vs.* Mercer, 8 Peters, 88, does not contravene the above, because it was rendered on a State statute and before the adoption of the 14th Amendment to the Constitution.

Black on Constitutional Prohibitions, Sec. 197, says:

"If the legislature cannot invade the province of the courts by imposing upon them, by retroactive statute, the necessity of adopting a different interpretation of an existing law from that which they had already placed upon it, it follows, *a fortiori*, that the legislature cannot directly control the action of the courts by setting aside their judgments or ordering a reconsideration of adjudications they have duly and formally reached. Hence an act of the legislature awarding a new trial in an action which has been decided in a court of law is unconstitutional." Thus it was said by Chief Justice Gibson: "If anything is self-evident in the structure of our government, it is that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new

trials is judicial, but the power of the legislature is not judicial. The legislature has gone no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a *suitor than it is injurious* in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexatious, risk and expense of another contest. Hence it will appear that a statute of this character is not only a practical assumption of judicial power, but is also obnoxious to the provisions which guard vested rights from invasion, and is therefore properly within our subject, and objectionable because of its retroactive effect upon past transactions."

Was the Proceeding Below Due Process of Law?

If it should be held that Congress has the power to create a special tribunal to examine into and nullify the judgments of the regularly constituted courts until the judgments of the courts shall in all things conform to the views of Congress, then we respectfully submit and insist that the law creating the special tribunal, in order to be constitutional and valid, must not compel or even authorize it to proceed in a way that is opposed to what is known as *due process of law*. One of the chief elements going to constitute *due process of law* is that the party against whom the proceeding affecting property is had must be made a party to the proceeding and have notice of it and opportunity to resist it. The courts of the country have in the true spirit of the Constitution been zealously guardful of the rights of private property, and have not hesitated to declare that under the 5th Amendment to the Constitution of the United States Congress cannot deprive a citizen of his property or of the use of the same without *due process of law*, which expression the courts have held to mean as above stated, that Congress could not by enactment disturb or destroy any

person's claim or right to property, without first giving him notice and an opportunity to be heard before a competent tribunal.

Holden *vs.* Hardy, 169 U. S., 366;
Davidson *vs.* New Orleans, 96 U. S., 97;
Craig *vs.* Kline, 65 Penn. State, 399;
Kilburn *vs.* Thompson, 103 U. S., 182;
Hurtado *vs.* People of California, 110 U. S., 535;
Orchard *vs.* Alexander, 157 U. S., 383;
Lowe *vs.* Kansas, 163 U. S., 85.

It is a matter of general information, besides it appears from the record in this case, that there are a large number, in fact over three thousand people, who obtained judgments in the United States Courts for the Central and Southern Districts of the Indian Territory establishing their right to enrollment in the Choctaw and Chickasaw tribes of Indians. These judgments were obtained under the Act of 1896, which provided for appeals in proceedings of that character from the Commission to the Five Civilized Tribes to such courts. The proceedings were instituted under and in accordance with the rules of procedure prescribed by the Interior Department, and such judgments have all of the sanctity and implied verity which usually attach to and inhere in the judgments of our courts. These judgments were more than two hundred in number, that is, there were more than that many cases—each judgment relating alone to a family and its collateral kindred. There was no connection between the judgments or the parties affected thereby. There was no joint or common proceeding, but each case was separate and independent of all other cases, every case resting alone upon its own peculiar facts.

The provisions of the treaty of 1902 under which the proceedings were had against which we here complain, authorized and required the special tribunal known as

the Choctaw and Chickasaw Citizenship Court to hear a proceeding instituted by the Choctaw and Chickasaw Nations against ten persons interested in these judgments to test the validity of the judgments on grounds specially set forth in the treaty; it being provided that the ten persons named in the judgments so selected by the Nations to proceed against, should be the representative of all other persons admitted to citizenship by all the other judgments, and that the judgment rendered in this particular test case should be decisive of the validity of all the judgments.

Now we respectfully submit that whatever subterfuges may have been resorted to in the provisions of this treaty to avoid the plain and simple requirements of the Constitution, and to cover up an actual violation of the constitutional rights of the people interested in all the judgments, except those named in the favored ten persons to be selected by the tribes to be made parties to this particular proceeding, ought not to be allowed to prevail. At least it is nothing but a legislative forfeiture of valuable property rights of a large number of citizens.

As before remarked, it is one of the fundamentals of *due course of law* that the party whose rights are to be affected shall be made a party to the proceeding, shall have notice of the same and an opportunity to appear and defend. Perhaps the universal application of and the reason for this rule and the authorities sustaining it, are nowhere better set forth than in the case of McArthur *vs.* Scott, 113 U. S., 340. We are not unmindful of the exception to this rule, that obtains in equity, that is, where the parties are so numerous that it would be inconvenient to name them all, the proceeding may be begun in the name of a few as representatives of the entire number, and it is possible that this rule also prevails where the defendants are numerous; but it can only prevail where the parties have a general

and common interest and where the parties named can be fairly said to be representative of all the interests involved. Parties having no joint interest cannot be forced in to unnatural relations, and one be made the judicial representative of another.

The persons holding judgments of the United States Courts of the Indian Territory admitting them to citizenship in the Choctaw and Chickasaw tribes have no general or common interests. No family can be said in any proper sense to be the representative of another family. Their original proceedings were separate and distinct, and in no manner associated or connected with each other. It is true that in these proceedings there was a common defendant in a large number of the cases, and it is true that the effect of the judgments was to enroll the applicants as members in one or the other of the tribes; but this does not have, necessarily, the effect of giving them a common interest in this proceeding. It is also true that the provisions of the treaty under consideration provided that all the judgments are to be annulled on either one of two grounds, which are supposed to be common to all the judgments. But this is no answer to our contention that a portion of these defendants cannot be fairly made the representatives of the remainder. The defences to these particular proceedings could easily be various, the parties in one judgment having no connection with and no knowledge of the defense in another.

It is not difficult to imagine that in many of the cases where actual notice was given to but one of the tribes that the other tribe may have appeared in such a way, assisted in the defense in such a manner as to bind it by the litigation; in truth, in a case brought in the Central District to annul the judgment on the identical grounds named in the treaty, in which Duke and others were plaintiffs and Good-

all and others were defendants, alluded to in the petition for writ of prohibition in this case, one of the defenses set up by those who obtained the judgment in that particular case was that the other tribe, while not made a formal party to the suit, and while not given legal notice, was present by its counsel and by its official representatives, and aided, consulted and advised as to the defense in such a way as to bind it. If these facts were true in that particular case, it was a complete answer to the suit in the test case; and if it is true in one case it may be true in many; in fact, it may be a full and complete defense in case of all the judgments other than the ten persons directly involved in the test case. It is a fact beyond dispute that a great number of the cases were tried by the Court upon the record and the same evidence introduced before the Dawes Commission. So an entire stranger might have as well been appointed or selected to represent these people so far as knowledge of or interest in their defenses were concerned, as to have selected part of them to represent the remainder.

The Citizenship Court has declared the judgments void because one-half of the people having clearly a common and joint interest with the others in the alleged subject-matter of the suit were not made parties and given notice of the proceeding; yet the provisions of the treaty under consideration authorizes all the judgments to be set aside by a proceeding, notice of which was not given to exceeding one-fourth of one per cent. of the people interested in them.

An additional reason why this law ought to be held void is, that it is partial or class legislation of the worst character; that it does not apply to and bear equally upon all persons of the same class or similarly situated. It selects ten persons admitted to citizenship and requires that these favored and particular few be given the right and benefit of personal service, but as to the others service is de-

nied, and they must find out about the pending proceeding the best way they can and come into court upon their own motion. The law thereby unjustly discriminating between people belonging to the same general class. This is contrary to the authorities as we understand them and invalidated the entire law. If Congress had the power to omit service as to any of the people interested in these judgments, why could it not serve only one person interested in one particular judgment? Certainly there is no difference in principle, but the latter proceeding would have made it manifest to the dullest mind that the whole scheme of service in this test case proceeding was a foolish farce. The law failing to bear upon all alike does not constitute *due process of law.*

Pennoyer *vs.* Neff, 95 U. S., 714;
Caldwell *et al. vs.* Texas, 137 U. S., 697;
Leper *vs.* Texas, 139 U. S., 468;
Giozza *vs.* Tierman, 148 U. S., 662.
See also Vol. 9, page 336, Rose's Notes on United States Reports.

It is true that the above authorities relate to the provision of the Fourteenth Amendment as applied to the acts of State legislatures, but it has more than once been held that the Fifth Amendment places the same restraint upon Congress that the Fourteenth Amendment does upon the State legislature. The language of the two Amendments in this particular being substantially similar, the meaning of the two is the same.

The tribes should not be allowed in this proceeding to evade the full force and application of these wholesome constitutional provisions on the ground that the person obtaining the judgments acquired no property rights thereby. The truth is that they are in no situation to make such a contention here, for an examination of the judgment and decision of the Citizenship Court will show that the oft-repeated

reason assigned in the opinion for holding these judgments void for lack of service on both tribes was that the judgment conferred valuable property rights. But if this were not true, the contention could not prevail in this controversy. While it is true that this Court in the case of Stevens *et al. vs.* Cherokee Nation, 174 U. S., 445, held that such judgments conferred no absolute property right, this decision was overruled and its reasoning entirely swept away by the Citizenship Court in the test case when that court came to illuminate the subject by its "more perfect" wisdom. But if this Court should still be inclined to think that the doctrine in Stevens *vs.* Cherokee Nation is still the law, we submit that long before the institution of this particular proceeding, and even before the enactment of the law that created the Citizenship Court, the judgments had ripened into and had become the instrument of conferring or securing valuable and absolute property rights. The act known as the Curtis Act, approved June 28, 1898, in the eleventh section provided that the roll of citizenship so made by the Dawes Commission (which necessarily included the people who obtained these judgments), should be the final roll of membership in said tribes and that each member of the tribe whose name appears upon the roll should be entitled to an interest in the land and to have the same allotted to him in severalty. Section 16 of the same Act provided that a member of the tribe could immediately enter into the possession of his portion of said land and occupy, use and rent the same, even before allotment.

30 Stat. at L., pp. 505–507;
People *vs.* Otis, 90 N. Y., 48;
St. Louis *vs.* Bar, 41 S. W., 1098;
Holden *vs.* Hardy, 169 U. S., 366.

We think it clear that at the time of the enactment of the treaty and the law under which the Citizenship Court

proceeded, that all the conditions and legal requirements existed to make the property rights of such persons as obtained judgments enrolling them as members of the tribes, within the protection of the constitutional provisions under discusion. We therefore respectfully submit that if this law is invalid and unconstitutional for no other reason than the lack of notice, the same should be held invalid for that reason alone.

The Act of June 28, 1898, known as the Curtis Bill or Atoka Treaty (p. 505, 30 Stat.), provides, "That all the lands within the Indian Territory belonging to Choctaw and Chickasaw Tribes shall be allotted to the members of said tribes so as to give to each member so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the land."

More than a year prior to this, the petitioner, Joins, had by the judgment of the United States Court in the Indian Territory been determined to be a member of the Chickasaw Tribe.

At the time the Choctaws and Chickasaws agreed to this treaty it was known that Joins was a member of the tribe, pronounced so by the judgment of the court. The tribes having agreed that lands should be allotted to him under this treaty, and he, acting upon the good faith of this treaty, having erected improvements upon the lands selected by him to the value of fifteen thousand dollars, the Choctaw and Chickasaw Nations are now estopped to assert that the petitioner is not a member of Chickasaw Tribe.

The grounds of an estoppel against a State may be drawn either from the acts or omissions of its public officers or from the action of its legislature and likewise against these tribes by the action of their commissioners, in making the treaty above referred to. Good faith should characterize the conduct of these tri e in their dealings with the petitioner

and the law will not exempt them from the doctrine of estoppel; like a private person they may be estopped by their acts, silence, consent or acquiescence.

See People *vs.* Stephens, 71 N. Y., 527;
Lindsay *vs.* Haws, 2 Black, U. S., 554;
State *vs.* Milk, 11 Fed., 389;
State *vs.* Flint, 89 Mich., 481;
Sanders *vs.* Hart, 57 Texas, p. 8;
State *vs.* Dint, 18 Mo., 313;
Alexander *vs.* State, 56 Ga., 478, and 49 Mo., 216.

Again, this treaty having provided that the lands of the two tribes should be alloted among the members of the tribes, and petitioner being at that time a member of the tribe, he took by the treaty the fee-simple title to his proportionate share of the Indian lands, as much so as if he had been named in the treaty. In other words, the treaty converted the Indian lands into individual property, and acted as a direct conveyance to the petitioner of his proportion of the tribal land. It does not matter that at that time the lands of petitioner had not been segregated from the common holdings, the treaty itself was a conveyance to petitioner of his interest in the lands, and all that remained to be done was the mechanical work of surveying and allotting to petitioner his proportionate share, in accordance with the provisions of said treaty, and executing to him the patent for the same.

The case of Jones *vs.* Mehan, 175 U. S., p. 1, settles this question conclusively. It was there held under a treaty similar in many of its provisions to the one under consideration, that the members of the tribe took directly by the treaty the fee-simple title to their respective property, notwithstanding the property was thereafter to be designated and segregated from the common holdings.

We think that it is clear that this treaty vested in the petitioner the fee-simple title to his proportionate share of

the lands and that same at that date became and now is a vested right and cannot be disturbed. This, we contend, has ripened into a vested right by the passage and ratification of said treaty and that a destruction of his citizenship destroys his right and title to this property. That under the laws and treaties between the United States and these tribes one cannot hold or have allotted to him his portion of these lands without being a citizen or member of the tribe, and if a citizen or member of the tribe, he cannot be deprived of his interest.

In the consolidated case of Stevens *vs.* Cherokee nation, the case of Joins (the petitioner in the present case), No. 487, this Court expressly decided that on the appeal from the Dawes Commission to the United States Court, that this and similar cases were to be tried *de novo*. This question having already been decided by this Court, Congress had no constitutional power to establish another and inferior tribunal and submit to it the determination of a question already passed upon by this Court.

(Stevens case, 174 U. S., pp. 445–492.)

The Constitution never intended that there should be but one Supreme Court (see U. S. *vs.* O'Grady, 89 U. S., p. 641), and when Congress undertook to create another tribunal to review this court it violated one of the fundamental principles of this Government. The statute that we complain of expressly says that this Citizenship Court shall determine whether or not these cases should have been tried "*de novo*," notwithstanding this Court in the Stevens case, after reviewing all the acts of the legislature and treaties with these tribes, held that the trial of these cases de novo by the courts in the Southern and Central districts were regular and proper, and we might say settled the notice proposition submitted to the Citizenship Court, for the act that this Court upheld and said was valid, did not provide for the notifying

of either nation or the making of either nation parties, but only required applicant to apply to the Dawes Commission for admission. So we conclude that if it was necessary to serve either or both of said nations in order to acquire citizenship, that this Court would have declared that the act that did not require either invalid and unconstitutional and that this Court in upholding said act in effect held that notice to both nations was not necessary to the validity of said judgments, and Congress had no power to create another tribunal to enquire into the same.

In the brief filed by the United States, pp. 15–16, it is insisted that because the Citizenship Court rendered its decree in the test suit, of which petitioner complains, December 17, 1902, prior to the institution of the prohibition proceeding herein, and certified the same to the Dawes Commission that such decree had become final, and had had its full effect and was entirely beyond the control of the said Citizenship Court at the time the petition was filed herein; and that as the effect of said decree was to cancel and annul the judgments rendered by the United States Courts in the Indian Territory under the Act of Congress, June 10, 1896, *supra*, and as such decree was and is self-executing no further action in the said test suit on the part of the Citizenship Court was necessary to give effect to said decree. And it is further contended that on account of the further provisions in Section 31 of the Act as follows:

"In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which judgment or decision is so annulled or vacated, shall upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and

certified to said Citizenship Court by the Court having custody and control of such files, papers and proceedings, and upon the filing in such Citizenship Court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed, in said Citizenship Court, and such further proceedings shall be had therein in that Court *as ought to have been had in the Court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.*"

That the proceedings therein provided for are not only separate and distinct from the test suit provided for in the said section, but wholly dependent upon the voluntary action of each and every individual whose judgment was so annulled and vacated. We do not concur in this interpretation thus announced, but to the contrary insist that by the plain terms of said Section 31 of the Act the power of the Citizenship Court to entertain jurisdiction of cases transferred to it necessarily, and as a condition precedent depends upon the validity of the decree rendered in the test suit, and that said Citizenship Court must continuously recognize and give effect to said decree else it has not the power or jurisdiction under the Act to try cases thus transferred to it. By the terms of the Act of June 10, 1896, as shown in the petition (21), the petitioner obtained from the United States Court for the Southern District of the Indian Territory a decree establishing his right to be recognized and enrolled as a member of the tribe of Chickasaw Indians, and directing the Dawes Commission to enroll him as such. From this decree, under Act of Congress, July 1, 1898 (30 Stat. at L., 590), the Chickasaw nation appealed directly to this honorable Court and by this Court said decree was affirmed. The effect of which was to place the name of petitioner upon the roll of Chickasaw citizenship then be-

ing made by said Commission pursuant to the Act of June 10, 1896, cited *supra*. (See Stephens *vs.* Cherokee Nation, 174 U. S., 446.) The effect of the certification of the decree in the test case, complained of, to the Dawes Commission is to direct and command said Commission to erase from the roll of Chickasaw citizenship the name of petitioner. And we do most respectfully submit if the said Commission should refuse or decline to thus erase the name of petitioner from the roll of Chickasaw citizenship, that said Citizenship Court by proper order made in said test case could compel said Commission to give effect to its said decree. We therefore seriously insist the power and control of said Citizenship Court over the decree in the test case has not ceased, and had not ceased at the time petitioner filed his petition herein for writs of prohibition and *certiorari*.

It is further contended by the United States, that because respondents in their answer say that petitioner, subsequent to filing his petition herein, has transferred his case to the Citizenship Court as is provided by Section 31, of the Act cited *supra*, that he has thereby waived the question of jurisdiction raised in his petition, but we submit that as the decree in the test case had been rendered at the time the petition herein was filed, that this honorable court in determining the jurisdiction and power of the Citizenship Court, in rendering the decree in the test case, will only look to and consider the record in said cause.

(Huguley Mfg. Co. *vs.* Gallatin, 175 U. S., 726; 143 U. S., 504; 36 C. C. A., 236.

It is clear therefore from the decisions last cited that as petitioner by this proceeding undertakes to prevent the effects of the judgment complained of that he would not be permitted to show by the evidence *aliunde*, the want of jurisdiction of the Citizenship Court in the test case, but must depend solely upon the record to establish such want of

jurisdiction. Why not the converse rule prevail? We further seriously insist if the Citizenship Court acted without jurisdiction in the test case because of the unconstitutionality of Section 31 complained of, that by consent of parties, the subsequent voluntary act of petitioner, the said act could not be made constitutional and a valid Citizenship Court thereby created with power to hear and determine the cause complained against.

It is also contended by the United States that the Citizenship Court acted in a political and not a judicial capacity, and in support of this proposition it cites Cherokee Nation *vs.* Hitchcock, 187 U. S., 294; Stephens *vs.* Cherokee Nation, 174 U. S., 446; Lone Wolf *vs.* Hitchcock, 187 U. S., 558; but a careful reading of these decisions does not show that this honorable Court has ever yet held that when a court is created, upon which jurisdiction is conferred to enquire into and judicially pass upon controversies submitted to it of a purely legal nature, and when such judicial inquiry is made and final adjudications had that the executive branch of the government, as such, can enquire into, cancel and set aside such judgments so rendered.

For reasons stated in the foregoing brief, as well as reasons stated in original brief filed herein, we respectfully submit that the petition for writs of prohibition and *certiorari* of petitioner should be granted as prayed in the petition.

WM. I. CRUCE,
CALVIN L. HERBERT,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 14—Original.

EX-PARTE: IN THE MATTER OF U. S. JOINS, *Petitioner.*

Demurrer of Petitioner to Reply, Answer and Return to Rule to Show Cause.

And now comes the petitioner, U. S. Joins, by his attorneys, and demurs to the reply, answer and return to the rule to show cause, filed herein August 24, 1903, by the respondents, the Honorable Spencer B. Adams, chief judge, the Honorables Walter L. Weaver and Henry S. Foote, associate judges, and James B. Cassada, clerk of the Choctaw and Chickasaw Citizenship Court, and as ground of demurrer the petitioner says:

First. Said answer, reply and return of the respondents does not show any lawful reason why writs of prohibition and certiorari against the respondents should not be granted by this honorable court for reasons stated and as prayed for in the petition.

Second. Petitioner specially demurs to paragraph one of the reply, answer and return of respondents because respondents attempt to avoid the issuance of the writs of prohibition and certiorari as prayed for in the petition solely on the ground that the judgment rendered by said Citizenship Court, December 17, 1902, in the cause pending on the docket thereof entitled the Choctaw and Chickasaw Nations

vs. J. T. Riddle, *et al.*, had become final, and, by said court, had been certified to the Commission of the United States to the Five Civilized Tribes prior to the filing herein the petition for writs of prohibition and certiorari.

Third. Petitioner further and specially demurring to said answer, reply and return of respondents says that paragraph two thereof states no lawful reason why the writs of prohibition and certiorari should not issue against them as prayed for in the petition in that respondents attempt to show only that the petitioner subsequent to the institution of the proceedings herein has estopped himself from questioning the jurisdiction of said Citizenship Court, and the constitutionality of Section 31 of the Act of Congress creating it, by voluntarily transferring to said Citizenship Court all the files, papers and proceedings in the cause of U. S. Joins *vs.* Chickasaw Nation theretofore filed and pending in the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and in which petitioner had under the Act of Congress of June 10, 1896, obtained a judgment establishing his identity as a member of the tribe of Chickasaw Indians.

And because the record herein does not show that petitioner transferred said cause to said Citizenship Court subsequent to the filing of the petition herein.

WILLIAM I. CRUCE,
CALVIN L. HERBERT,
Counsel for Petitioner, U. S. Joins.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. ....., Original.

EX PARTE: IN THE MATTER OF U. S. JOINS,
PETITIONER.

Reply and Brief of the Choctaw and Chickasaw Nations to the Motion for Leave to File a Petition for Writs of Prohibition and for Certiorari against the Choctaw and Chickasaw Citizenship Court.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America and to the Court:

Now come the Choctaw and Chickasaw Nations, by leave of this honorable court, and show respectfully that the motion of the petitioner, U. S. Joins, for leave to file a petition for writs of prohibition and certiorari against the Choctaw and Chickasaw citizenship court should not be granted:

1. Because it appears from the petition tendered with said motion that the Choctaw and Chickasaw citizenship court has proceeded in strict conformity to the act of Congress referred to in said petition creating said court and defining its jurisdiction.

2. Because, as appears from said petition, said legislation was enacted and said court created by Congress in the exercise of its power in administering the affairs of the Choctaw and Chickasaw Nations or tribes of Indians, and is constitutional and valid.

3. Because it appears that the proceedings complained of in said court in said cause number 1 have been ended by the final judgment of said court, and that nothing remains to be done by the court in respect thereto.

4. Because it appears by said petition that U. S. Joins, the petitioner, did not appear upon the trial of said cause and file a plea to the jurisdiction of said court, nor in any way object thereto.

5. Because said Choctaw and Chickasaw citizenship court is not a part of the established judicial system of the United States of America, over which this honorable court has jurisdiction, but that said court is a special legislative tribunal established by an act of Congress, referred to in said petition, for the purpose of overcoming the difficulties in the administration of the affairs of the Choctaw and Chickasaw Nations, or tribes of Indians, encountered by the executive department of the Government of the United States in carrying out the general policy of the Government of the United States to cause the lands of said Indians to be allotted among them in severalty and to ultimately create a State of the Union out of the area embraced within the lands of the Five Civilized Tribes, and that such action is political and executive in its nature, and not the proper subject of judicial inquiry or interference.

BRIEF AND ARGUMENT IN SUPPORT OF REPLY.

It is not contended by the petitioner that the Choctaw and Chickasaw citizenship court has exceeded its jurisdiction, but it is contended that the act creating said court is unconstitutional, and that therefore this honorable court can properly entertain a petition for a writ of prohibition to that court.

Before commencing a discussion of the general questions involved, we deem it proper to briefly call the attention of the court to the object of the creation of the Choctaw and Chickasaw citizenship court. In pursuance of its settled policy to fit the Indians for citizenship and to abolish their tribal relations, and in the case of the Five Civilized Tribes to erect a State of the Union out of the area embraced within the lands of said tribes, Congress has from time to time passed various acts and entered into various treaties and agreements with the Choctaw and Chickasaw Nations and other nations of the Five Civilized Tribes. All of this legislation, except that passed since the decision, has been reviewed and considered by this court in the case of Stephens *vs.* The Cherokee Nation, 174 U. S., 445, 483–'4–'5. In that case the court passed upon only one question, the constitutionality of the legislation which authorized the commission to the Five Civilized Tribes to exercise citizenship jurisdiction and provided for an appeal from the decision of such commission to the United States courts in the Indian Territory, and the contention that the act of July 1, 1898, in extending the remedy by appeal to the Supreme Court of the United States was invalid because retrospective and destructive of vested rights. In passing upon these questions the court said :

"The grant of a new remedy by way of review has been often sustained under particular circumstances."

(See cases there cited.)

The court then says:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right."

After reviewing the various treaties and decisions of the courts, tending to show the plenary power of Congress over these Indian tribes, the court declared the entire legislation to be constitutional.

It is now regarded as well settled that in dealing with these Indian questions, the action of the Government is regarded as political and executive in its nature, and any questions that may arise are beyond the sphere of judicial cognizance. (See Thomas *vs.* Gay, 169 U. S., 264; The United States *vs.* James A. Rickert (not yet reported) and cases there cited; Lone Wolf *et al. vs.* Ethan A. Hitchcock *et al.* (not yet reported).)

In the latter case the court said:

"In view of the legislative power possessed by Congress, over treaties with the Indians, and Indian tribal property, we may not specially consider the contentions pressed upon our notice, * * * since all these matters in any event were solely within the domain of the legislative authority, and its action is conclusive upon the courts." (See also Cherokee Nation *vs.* Hitchcock (not yet reported), where it was held that full administrative power was possessed by Congress over Indian tribal property.)

We submit that these cases are conclusive as to the power of Congress to enact such legislation, and since it is not contended that the court is endeavoring to exceed its jurisdiction, if this view is sustained the motion for leave to file the petition should be denied.

We respectfully urge that the Choctaw and Chickasaw citizenship court is a special legislative tribunal, which should be considered as a part of the executive department of the Government engaged in carrying out the Indian pol-

icy of the United States, and that as such its duties should be considered political in their nature and not the proper subject of judicial inquiry. It is certain that Congress, in the exercise of its plenary power over these Indian tribes, endeavored in every way possible to shield that court from interference. Section 33 of the act of July 1, 1902, creating the court, provides:

"The judgment of the citizenship court, in any or all of the suits or proceedings so committed to its jurisdiction, shall be final."

The necessity existed, and we submit that Congress had the power to erect this tribunal, in furtherance of its duty to these Indian tribes, and to provide that its judgment should be final.

The petitioner alleges himself to be a member of the Chickasaw Nation or tribe of Indians, and is bound as a member of said tribe by the terms of the agreement creating said court.

We respectfully submit that, in this view of the case, the motion to file said petition should not be granted.

The agreement of March 21, 1902, contained in the act of July 1, 1902, provides, in section 73, that "this agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following * * * " This agreement was voted on by the Choctaw and Chickasaw Nations and adopted on the 25th day of September, A. D. 1902, and duly proclaimed as provided in said agreement.

If the petitioner, as he asserts in his petition, is a member of the Chickasaw Nation, he is bound by the act of the nation and cannot be heard to question the authority of the court.

In the case of The Delaware Indians *vs.* The Cherokee Nation, decided on February 2, 1903, by the Court of Claims, the court says on this point:

"By the voluntary act of the Delawares they became a part of the nation at the time the provision of the constitution was in force under which from time to time the admission of persons has been allowed, and without a formal decision of its legality, it is the opinion of the court that the complainants are estopped from questioning the binding force of the constitution."

As a further reason why said motion should not be granted, we submit that, as appears by said petition, no plea to the jurisdiction of the court was filed by petitioner, U. S. Joins, and therefore no writ of prohibition could lawfully issue upon his application. It is necessary that he should show that such a plea was tendered, and that the court refused to entertain the plea. (See High's Extraordinary Legal Remedies, 1st edition, sec. 773.)

It appears from said petition that the test case provided for in section 31 of said act of Congress was, by the citizenship court, finally decided on the 17th day of December, 1902. The law does not require the exercise of any further jurisdiction by this court as regards the power conferred by said section 31. The case decided by the court under the provisions of that section is finally ended, and a writ of prohibition could not, therefore, issue to the court in any event. (See High's Ex. Legal Rem., sec. 766; U. S. *vs.* Hoffman, 4th Wallace, 158.)

PETITIONER HAS AN ADEQUATE REMEDY AT LAW.

The writ of prohibition should not be granted as prayed for in said petition, because Congress, in the exercise of its power, has provided in the act of July 1, 1902, and by the terms of said agreement, that all persons thus deprived of a favorable judgment may, within ninety days, cause their

cases to be certified to the Choctaw and Chickasaw citizenship court, where they shall be determined, and Congress has, by the act of March 3, 1903, provided that said court shall have power to take all needful testimony and to pass upon the merits of the claims of all those persons to citizenship (*In re* Huguley Mfg. Co. *et al.*, 184 U. S., 297).

We respectfully submit, upon the whole case, that the motion for leave to file the petition should be denied.

GEORGE A. MANSFIELD,
JOHN F. MCMURRAY,
MELVEN CORNISH,
Counsel for the Choctaw and Chickasaw Nations.

Supreme Court of the United States

OCTOBER TERM, 1902.

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No. [illegible], Original.

EX PARTE: IN THE MATTER OF S. S. JOHNS,
PETITIONER.

Supplemental Reply and Brief of the Choctaw and Chickasaw Nations to the Motion for Leave to File a Petition for Writs of Prohibition and for Certiorari Against the Choctaw and Chickasaw Citizenship Court.

GEORGE A. MANSFIELD,
JOHN F. McMURRAY,
MELVER CORNISH,
Counsel for the Choctaw and Chickasaw Nations.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1902.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. ....., Original.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.

Supplemental Reply and Brief of the Choctaw and Chickasaw Nations to the Motion for Leave to File a Petition for Writs of Prohibition and for Certiorari Against the Choctaw and Chickasaw Citizenship Court.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now come the Choctaw and Chickasaw Nations, by leave of this honorable court, and, in addition to the reply and brief heretofore filed by them, respectfully present that the motion of the petitioner, U. S. Joins, should not be granted:

1. Because this court has no power in any case to issue a writ of prohibition to the Choctaw and Chickasaw Citizenship Court, said court not being a district court of the United States within section 688 of the Revised Statutes, and not being a court over which this court has any appellate jurisdiction.

2. Because it appears from the petition tendered with said motion that the Choctaw and Chickasaw Citizenship Court in the matter complained of proceeded in strict conformity to the act of Congress referred to in said petition creating said court and defining its jurisdiction; that said court is not a part of the established judicial system of the United States over which this honorable court has jurisdiction, but that said court is a special legislative tribunal established by an act of Congress as a part of the machinery devised by it for the purpose of overcoming the difficulties encountered by the political departments of the Government—the Executive and Congress—in carrying out the general policy of the United States to cause the lands of said Indians to be allotted among them in severalty, and ultimately to create a State of the Union out of the area embraced within the lands of the Five Civilized Tribes; that such action is political and executive in its nature and not the proper subject of judicial inquiry or interference.

3. Because the proceedings complained of in said court in said cause No. 1 have been ended by the final judgment of said court, and nothing remains to be done by the court in respect thereto.

4. Because it appears by said petition that U. S. Joins, the petitioner, did not appear upon the trial of said cause and file a plea to the jurisdiction of said court, nor in any way object thereto.

5. Because the petitioner, U. S. Joins, has an adequate remedy at law and does not show that the proceedings in said court have or will cause him any injury for which a legal remedy does not exist.

6. Because Congress has provided that all persons deprived of a favorable judgment by the decree of the Choc-

taw and Chickasaw citizenship court, rendered on the 17th day of December, 1902, under the provisions of section 31 of said treaty, may have the proceedings in said cause transferred from the United States court in which it was rendered to said citizenship court for such further proceedings as will enable that court to determine the "very right of the controversy;" that this is an adequate remedy at law of which the petitioner, U. S. Joins, has availed himself since the filing of his motion for the writ of prohibition in this court, together with practically all of the persons similarly situated, and said cases are now pending in that court for determination at the special instance and request of all of said persons.

A certificate showing that said petitioner has so invoked the jurisdiction of that court is attached hereto as Exhibit "A."

BRIEF AND ARGUMENT IN SUPPORT OF REPLY.

The contention upon which the petitioner bases his right to file his petition is that the law creating the Choctaw and Chickasaw Citizenship Court is unconstitutional and void; that Congress had no power to create this court and vest it with jurisdiction.

In considering this question, it is well to review in a general way what Congress has done in an endeavor to settle up the affairs of the Five Civilized Tribes.

This purpose will be largely accomplished by an examination of the case of Stephens *vs.* The Cherokee Nation, 174 U. S., 445. There the court reviews very fully the successive steps taken by Congress in its endeavor to administer upon the affairs of the Five Civilized Tribes up to the time of that decision. In that case the court passed upon only one question and was authorized to pass upon one only—*i. e.*, the constitutionality of the legislation.

As stated by the court in that decision, owing to the mag-

nitude of the interests involved and the unusual means required to enable the United States of America, the guardian, to discharge its duty to these wards, Congress probably desired, in view of the fact that it might have to proceed further along the same lines, to have the opinion of this court as to the constitutionality of such measures. This court held all the legislation to be constitutional.

Since that decision, in the prosecution of the work of administering upon Indian affairs in the Choctaw and Chickasaw Nations, the Executive Department of the Government encountered many difficulties, which were called to the attention of the Department and of Congress in the annual reports of the Commission to the Five Civilized Tribes and of the United States Indian inspector located in Indian Territory. One of the most serious difficulties encountered was as to the determination of citizenship and the closing of the rolls required to be made by the Commission to the Five Civilized Tribes. It was contended by the nations that that class of persons admitted to citizenship by the United States courts in the Central and Southern districts of the Indian Territory were for the most part white persons and adventurers of the worst type, and that wholesale fraud and perjury had been practiced in securing said judgments. Said nations had filed a protest with the Commission to the Five Civilized Tribes against the enrollment of all those persons commonly called "court claimants," not only stating facts which tended to show that a great wrong had been done them by the rendering of judgments purporting to admit such persons to citizenship, but alleging that said judgments were void for lack of proper service upon both of said nations and for other irregularities.

In pursuance of their attempt to prevent said persons from being enrolled, certain individual members of the tribes, endeavoring to sue for themselves and all other members of said tribes, had filed a bill in equity in the

United States court for the Southern district of the Indian Territory against one Goodall *et al.*, endeavoring to have said judgments vacated and set aside, and the defendants enjoined from exercising any rights under said pretended judgments. A similar bill in equity had also been filed in the Central district of Indian Territory against Arnold *et al.*

The number of persons so claiming citizenship under the judgments of the United States courts in the Choctaw and Chickasaw Nations was several thousand. There was no provision of law by which the Choctaw and Chickasaw Nations could bring any action for their relief ; and, even if such a law had existed, actions could not have been prosecuted in all of such cases without such an expenditure of time and money as would render such a course impossible.

The Secretary of the Interior, being authorized by law to take such a course, directed the Commission to the Five Civilized Tribes to endeavor to negotiate a supplemental treaty or agreement with the Choctaw and Chickasaw Nations. Such an agreement was made between the representatives of the United States and said tribes on the 7th day of February, 1901. In transmitting this to Congress, the Secretary of the Interior used the following language:

"Believing that the questions affecting the validity and rectitude of these judgments deserved judicial investigation and scrutiny, article 8 has been rewritten, as shown in the amended draft of the agreement, so as to provide for a fair, speedy, and final decision of these questions by judicial tribunals.

"Experience has demonstrated that the Atoka agreement, ratified by the act of June 28, 1898, is faulty and does not work with satisfaction to the Indians or to the public. There is pressing reason for supplementing it by a new and further agreement. Unless this is done, the work of the Dawes Commission, as to these two tribes, must necessarily either be suspended for the time being or be attended with a degree of uncertainty which ought not to obtain in the administration of a law affecting many public and private interests.

"I believe that the agreement of February 7, 1901, as amended at the conference here named, will fully and effectually remove the difficulties which have heretofore attended the administration and execution of the Atoka agreement, and I earnestly and respectfully recommend that such amended agreement (a copy of which is herewith transmitted) be ratified by Congress."

This agreement having been transmitted on February 23, 1901, did not reach Congress in time to receive congressional action.

And the Secretary of the Interior, to remove the difficulty spoken of in his letter, directed the Dawes Commission to negotiate another treaty along the same lines, for transmittal to the Fifty-seventh Congress at its first session. This agreement contained the provisions which, as afterward ratified by the act of Congress of July 1, 1902, created the Choctaw and Chickasaw citizenship court. The Secretary of the Interior in transmitting this agreement to Congress, in addition to what he had previously stated, said:

"The subject-matter of this agreement has been most carefully considered by this Department, and I very earnestly recommend that the agreement be ratified in its present form."

Congress has, at its present session, amended the law creating said court by, in effect, providing that it shall have power to take all necessary testimony in all cases pending before it.

We have gone thus fully into the history of this legislation that the court might be enabled to see how great was the necessity for action along these lines by Congress and how thoroughly the matter has been considered by the legislative and executive departments of the Government.

As showing how the agencies employed in the Indian Territory are considered by those most familiar with their character and operations, we desire to quote the following

from the report of the Commission to the Five Civilized Tribes in 1894:

"The yearly proceedings of the Commission to the Five Civilized Tribes, of which the following pages are a record, fully indicate the functions of the organization and the progress which is being made in their exercise. It is believed that the efforts of the commission have been rewarded with a degree of success which gives assurance of the practicability of the union of legislative, executive and judicial action in one dynamic force for the administration of public affairs such as the reconstruction of Indian Territory involves. Debilitated governments, through the art of diplomacy, were to be dethroned; communal land holdings transmuted to individual ownership; the *bona fide* members of the tribes to be identified, and all with the least possible hazard to political and property rights. Through the legislative function, agreements which are to become law for the administration of these estates are negotiated. Through the judicial, the right to participate as members of the tribes is adjudicated and contentions between members involving the right to possession of given tracts of land are determined. Through the executive, the laws governing many matters affecting the property of the Five Tribes are administered. Thus has a public undertaking of great magnitude been brought within the purview of business principles with which a scheme of divided authority is incompatible."

We regard the action of the United States in establishing this machinery for the settling of this vexed question as political in its nature, and the Choctaw and Chickasaw Citizenship Court is but a part of that machinery. It can be readily seen that to stop the performance of the labors confided to that court by Congress would necessarily suspend the work of all the other departments dealing with this question, thus practically nullifying the work sought to be accomplished by the making of these treaties and the enactment of this legislation.

THE SUPREME COURT HAS NO JURISDICTION TO ISSUE THE WRIT OF PROHIBITION TO THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

The Supreme Court of the United States has been empowered by Congress to issue writs of prohibition to the district courts of the United States when proceeding as courts of admiralty, but in no other case.

Ex parte Gordon, 1 Black (U. S.), 503.
Ex parte Christy, 3 Howard, U. S., 293.
Ex parte Easton, 95 U. S., 68.
Ex parte Phenix Ins. Co., 118 U. S., 610.

This court entertained an application for the writ to the district court of Alaska when proceeding as a court of admiralty in the case of *In re* Cooper, 138 U. S., 404; but, upon a final hearing, 143 U. S., 472, declined to issue the writ, upon the ground that the record showed jurisdiction in the district court of Alaska. The court, however, stated in that opinion that it might well have rested its denial of the writ "upon the well-settled principle that an application to a court to review the action of the political department of the Government * * * should be denied."

A libel of review of a decree of confiscation is of the same nature and jurisdictional character as the original case, and, although the act under which the proceedings were had provided that they should be *in rem* and "conform as nearly as may be to proceedings in admiralty or in revenue cases," it is not a case in admiralty, in which case only the Supreme Court of the United States can issue a writ of prohibition to the district court (*Ex parte* Graham, 10 Wallace, 541).

The only cases in which the Supreme Court has actually issued the writ to any court are—

United States *vs.* Peters, 3 Dall., U. S., 121, and
Ex parte Phenix Ins. Co., 118 U. S., 610,

both being admiralty cases in district courts.

In the case of *In re* Baiz, 135 U. S., 403, the writ was applied for to restrain the district court of the southern district of New York from proceeding further in a libel suit against the petitioner on the ground that he was consul general and acting minister of the Republic of Guatemala, and that the district court was therefore without jurisdiction. The question of the authority of this court to issue the writ was not discussed by the court, as the writ was refused on the ground that it appeared that the Secretary of State had declined to recognize petitioner as acting in such diplomatic capacity, which action was deemed conclusive by the court, and, not being entitled to the protection accorded a foreign minister, his petition was denied on that ground.

In *Ex parte* Gordon, 1 Black, 503, on an application for a writ of prohibition to the circuit court, after the applicant had been convicted of piracy and sentenced to be executed, the court said, approving *Ex parte* Christy, 3 Howard, 292:

"The result of this opinion is that a prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ. We concur in this opinion, and the rule applies with equal force to the case before us, as it did in the case referred to."

In *Ex parte* Warmouth, 17 Wall., U. S., 64, the court remarked that it had "no jurisdiction in this case to issue a writ of prohibition until an appeal is taken," and in Virginia, petitioner, 131 U. S., Appendix LXXXIX, the decision of the court was withheld until a certificate of division of opinion between the district and the circuit judges could be filed.

The writ was applied for to restrain the circuit court in the case of *In re* Rice, 155 U. S., 396, but the jurisdiction to issue the writ was not discussed, the denial of it being made on other grounds.

The writ cannot be issued where the court is without appellate authority or special authority to issue it.

Ex parte Gordon, *supra.*

See also Chesapeake, etc., R. Co. *vs.* White, 111 U. S., 134.

Spelling's Extraordinary Relief, vol. 2, sec. 1735.

Foster's Federal Practice, 3d edition, vol. 2, sec. 362.

The authority last cited states in brief the rule to be that except as to United States courts having maritime admiralty jurisdiction and the United States district court for Alaska, or when necessary for the exercise of its own jurisdiction, this court has no power to issue the writ of prohibition.

CHOCTAW AND CHICKASAW CITIZENSHIP COURT IS A PART OF THE EXECUTIVE MACHINERY.

We respectfully urge that the Choctaw and Chickasaw Citizenship Court is a special legislative tribunal, which should be considered as a part of the executive department of the Government engaged in carrying out the Indian policy of the United States, and that as such its duties should be considered political in their nature and not the proper subject of judicial inquiry. It is certain that Congress, in the exercise of its plenary power over these Indian tribes, endeavored in every way possible to shield that court from interference. Section 33 of the act of July 1, 1902, creating the court, provides:

"The judgment of the citizenship court, in any or all of the suits or proceedings so committed to its jurisdiction, shall be final."

The necessity existed, and we submit that Congress had the power to erect this tribunal, in furtherance of its duty to these Indian tribes, and to provide that its judgment should be final.

In the case of Cherokee Nation *vs.* Hitchcock the court cites, with approval, the case of Stephens *vs.* Cherokee Nation, 174 U. S., 445, and says:

"We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

Both the Executive and Congress have determined this special tribunal to be necessary to do justice to these tribes, and the wisdom of their course cannot be determined here.

In the case of Lone Wolf *et al. vs.* Ethan Allen Hitchcock *et al.*, not yet reported, this court says:

"Indeed the controversy which this case presents is concluded by the decision in Cherokee Nation *vs.* Hitchcock, (— U. S., —) decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained."

See also United States *vs.* James A. Rickert (— U. S., —), not yet reported.

The three branches of the Government are independent and co-ordinate, and the courts have no authority to send the writ of prohibition to other branches than the judicial.

Grier *vs.* Taylor, 4 McCord, L. S. Car., 206.
Smith *vs.* Whitney, 116 U. S., 167.
In re Cooper, 143 U. S., 472.

It will therefore be refused where its object is to restrain the action of legislative bodies or executive officers.

Spring Valley Water Works *vs.* Bartlett, 63 Cal., 245.
And other cases cited in note 4, page 1108, Ency. Pl. and Pr., vol. 16.
High's Extr. L. Rem., 3d ed., sec. 782.

IF THIS COURT HAD JURISDICTION, THE PETITION DOES NOT DISCLOSE A PROPER CASE.

Passing over the questions of the jurisdiction of this court to issue the writ, and the fact that it is asked against the machinery of the political department of this Government, we submit that the petition does not disclose a proper case for the exercise of this extraordinary remedy.

In the case of *In re* Hugley Mfg. Co. and others, 184 U. S., 297, the court said:

"It is firmly established that where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the case originally, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to the writ of prohibition as a matter of right.

"But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts that are not made matters of record, the granting or refusal of the writ is discretionary."

In this case the petitioner has evidently waited to see how the court below would decide the test case under section 31,

and, the decision having been adverse, is attempting to review the action of that court in this manner. The petition alleges that U. S. Joins did not appear and plead in the case below, and therefore, we submit, his motion should be denied.

Even in a proper case the petitioner must show:

1. That the court against whom the writ is sought is about to exercise judicial or quasi-judicial power.

2. That the exercise of such power is unauthorized by law.

3. That it will result in injury for which no other adequate remedy exists.

See High's Extraordinary Legal Remedies, sec. 764*a*, 3d edition.

In the case at bar the court is not about to exercise judicial power. The test case provided for by section 31 is at an end. Nothing remains to be done, and the citizenship court has no power at this time to do anything which could annul or affect their judgment in the test case.

The exercise of its power is under a valid act of Congress, and that act, in sections 32 and 33, provides an adequate remedy at law which the petitioner, since his application to this court for the writ of prohibition, has invoked by causing the papers and proceedings in the case admitting him to membership in the Chickasaw Nation to be certified from the United States court for the Southern district of the Indian Territory to the Choctaw and Chickasaw Citizenship Court for trial under section 31 of said act.

THE LEGISLATION IS CONSTITUTIONAL.

The act creating the Choctaw and Chickasaw Citizenship Court was passed by Congress in the necessary and proper

exercise of its power in administering the affairs of these tribes. It was necessary to save them from fraud and wrong, and Congress had the power to determine what means were necessary and to provide them.

McCullough *vs.* Maryland, 4th Wheaton, 316, 404.
Stephens *vs.* Cherokee Nation, 174 U. S., 445.

In the latter case the court passed upon only one question, the constitutionality of the legislation which authorized the Commission to the Five Civilized Tribes to exercise citizenship jurisdiction, and provided for an appeal from the decision of such commission to the United States courts in the Indian Territory, and the contention that the act of July 1, 1898, in extending the remedy by appeal to the Supreme Court of the United States was invalid because retrospective and destructive of vested rights. In passing upon these questions the court said:

"The grant of a new remedy by way of review has been often sustained under particular circumstances."

The court then says:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right."

After reviewing the various treaties and decisions of the courts, tending to show the plenary power of Congress over these Indian tribes, the court declared the entire legislation to be constitutional.

It is now regarded as well settled that in dealing with these Indian questions the action of the Government is regarded as political and executive in its nature, and any questions that may arise are beyond the sphere of judicial cognizance. (See Thomas *vs.* Gay, 169 U. S., 264; The United

States *vs.* James A. Rickert (not yet reported) and cases there cited; Lone Wolf *et al. vs.* Ethan A. Hitchcock *et al.* (not yet reported).)

In the latter case the court said:

"In view of the legislative power possessed by Congress, over treaties with the Indians, and Indian tribal property, we may not specially consider the contentions pressed upon our notice, * * * since all these matters in any event were solely within the domain of the legislative authority, and its action is conclusive upon the courts." (See also Cherokee Nation *vs.* Hitchcock (not yet reported), where it was held that full administrative power was possessed by Congress over Indian tribal property.)

We submit that these cases are conclusive as to the power of Congress to enact such legislation, and since it is not contended that the court is endeavoring to exceed its jurisdiction, if this view is sustained the motion for leave to file the petition should be denied.

THE PETITIONER IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE ACT.

The petitioner alleges himself to be a member of the Chickasaw Nation or Tribe of Indians and is bound as a member of said tribe by the terms of the agreement creating said court.

We respectfully submit that in this view of the case the motion to file said petition should not be granted.

The agreement of March 21, 1902, contained in the act of July 1, 1902, provides, in section 73, that "this agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following * * *." This

agreement was voted on by the Choctaw and Chickasaw Nations, and adopted on the 25th day of September, A. D. 1902, and duly proclaimed, as provided in said agreement.

If petitioner, as he asserts in his petition, is a member of the Chickasaw Nation, he is bound by the act of the nation and cannot be heard to question the authority of the court.

In the case of The Delaware Indians *vs.* The Cherokee Nation, decided on February 2, 1903, by the Court of Claims, the court says on this point:

"By the voluntary act of the Delawares they became a part of the nation at the time the provision of the constitution was in force under which from time to time the admission of persons has been allowed, and without a formal decision of its legality, it is the opinion of the court that the complainants are estopped from questioning the binding force of the constitution."

The petitioner, U. S. Joins, has now pending before the Choctaw and Chickasaw Citizenship Court his case as a claimant to Chickasaw citizenship and enrollment, the same having been transferred on his petition to that court for trial under the provisions of section 31 of the act of July 1, 1902, since he filed his motion in this court. Having voluntarily invoked the jurisdiction of that court, he is estopped from questioning its authority, and certainly could not invoke this extraordinary remedy of prohibition against it under such circumstances.

6. THE WRIT WILL NOT BE USED TO UNDO THAT WHICH IS DONE.

As appears from said petition, the test case provided for in section 31 of said act of Congress was, by the Citizenship Court, finally decided on the 17th day of December, 1902. The law does not require the exercise of any further jurisdiction by this court as regards the power conferred by said

section 31. The case decided by the court, under the provisions of that section, is finally ended and a writ of prohibition could not therefore issue to the court in any event. (See High's Ex. Legal Rem., sec. 766; U. S. *vs.* Hoffman, 4 Wallace, 158.)

State *vs.* Stockbourne, 14 S. C., 417.

Brooke *vs.* Warren, 5 Utah, 89.

7. THE PETITIONER MUST HAVE OBJECTED TO THE JURISDICTION OF THAT COURT IN VAIN.

As a further reason why said motion should not be granted, we submit that, as appears by said petition, no plea to the jurisdiction of the court was filed by petitioner, U. S. Joins, and therefore no writ of prohibition could lawfully issue upon his application. It is necessary that he should show that such a plea was tendered and that the court refused to entertain the plea. (See High's Extraordinary Legal Remedies, 3d ed., sec. 765.)

We do not consider it necessary to discuss the question attempted to be raised by petitioner as to the suit already pending in the United States court for the Southern district of the Indian Territory. That suit is entirely different from the one authorized to be brought under section 31. The parties are different and it is different in many other important particulars; but, even if they were exactly similar, the pendency of that action could not affect the power of Congress to execute the trust reposed in it by providing necessary and appropriate legislation to protect the property of these tribes, and the result of the establishment of the Choctaw and Chickasaw Citizenship Court and the filing of the test case there would be to abate the actions already brought. This view of the law was, in fact, taken, we presume, by the court of appeals for the Indian Territory, in which the case

of Dukes *et al. vs.* Goodall *et al.* was pending, as the court declined to hand down an opinion after the passage of the act of July 1, 1902.

We respectfully submit that the motion for leave to file the petition should be denied.

GEORGE A. MANSFIELD,
JOHN F. McMURRAY,
MELVEN CORNISH,
Counsel for the Choctaw and Chickasaw Nations.

"EXHIBIT A."

SOUTH MCALESTER, *M'ch* 19, 1903.

TO MANSFIELD, MCMURRAY & CORNISH,
Att'ys Choctaw and Chickasaw Nations,
Shoreham Hotel, Washington, D. C.:

Petition for transfer of case of U. S. Joins *et al. v.* Chickasaw Nation from United States court, Southern district, Indian Territory, was filed in the Choctaw and Chickasaw Citizenship Court on March 17, 1903, and the case has been duly docketed, and writ of error has issued. Cruce and Cruce, of Ardmore, Indian Territory, are attorneys of record.

J. B. CASSADA,
Clerk Choctaw and Chickasaw Citizenship Court.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.
NO. 12. ORIGINAL.

PETITION FOR WRITS OF PROHIBITION AND CERTIORARI TO THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The question sought to be raised upon this petition is the constitutionality of the legislation by Congress (act of July 1, 1902, c. 1362, 32 Stat., 641, 646–9) establishing the Choctaw and Chickasaw Citizenship Court and authorizing it to review the judgments of the United States courts in the Indian Territory in certain Choctaw and Chickasaw citizenship cases appealed thereto from the Dawes Commission, as the Commission to the Five Civilized Tribes of Indians is commonly called.

By the act of June 10, 1896, c. 398 (29 Stat., 321, 339), Congress, in pursuance of its plan to extinguish

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the tribal title to lands in the Indian Territory by allotting the same in severalty among the members of the several tribes or nations therein, with a view to the ultimate erection of a State or States, authorized the Dawes Commission to proceed at once to hear and determine the application of all persons to be admitted and enrolled as citizens in any of said nations, in doing which they were required to respect "all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes."

The rolls of citizenship of the several tribes, as then existing, were confirmed by that act, and any person whose application to be enrolled had been denied or not acted upon by the Commission within the time prescribed, or who might desire such citizenship, was authorized to apply to the legally constituted court or committee designated by the several tribes.

In the performance of their duties the Commission were authorized to administer oaths, issue process for and compel the attendance of witnesses, send for persons, papers, etc., "and to use every fair and reasonable means within their reach *for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud and wrong.*"

It was also provided by the act of June 10, 1896, that the tribe or any person aggrieved with the decision of the tribal authorities or the Commission might

appeal to the United States *district* court, whose judgment should be final.

After the expiration of six months, the Commission were required to "cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose rights may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations, or tribes, *subject, however, to the determination of the United States courts as provided herein.*"

The Commission were also required "to file the lists of members as they finally approved them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities."

In exercising the appellate jurisdiction conferred upon them by the act of June 10, 1896, the United States courts in the Indian Territory did not limit their inquiry to a review of the citizenship cases appealed thereto from the Dawes Commission upon the papers and evidence submitted to that Commission, but examined such cases *de novo*, upon evidence taken before commissioners appointed for that purpose. As a result, it is claimed, opportunity was given for the commission of fraud and perjury by numerous persons, commonly designated "court claimants," wrongfully seeking admission into said tribes, and whose applications had been denied by the Commission.

The Choctaw and Chickasaw nations filed a protest with the Dawes Commission against the enrollment of

any such persons as members of their respective tribes, on the ground not only of illegality and fraud in the procurement of such judgments, but because of the failure to give notice of such proceedings to both of said nations, and for other irregularities.

By a provision in the Indian appropriation act of July 1, 1898, c. 545 (30 Stat., 591), inspired, it is to be inferred from later events, by dissatisfaction with the proceedings of the United States courts in the Indian Territory in matters relating to enrollment and the allotment of lands, appeals to this court were allowed to either party from those courts "in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases."

In *Stephens* v. *Cherokee Nation* (174 U. S., 445), however, it was held that the appeal given by this act was restricted to a determination of the constitutionality and validity of the legislation by Congress affecting citizenship or the allotment of lands in the Indian Territory (which was upheld) and did not extend to a review of either class of cases upon their merits.

In pursuance of the attempt to prevent the "court claimants" from being enrolled, certain individual members of the Choctaw and Chickasaw nations, endeavoring to sue for all other members of said tribes as well as themselves, filed a bill in equity in the

United States court for the southern district of the Indian Territory against one Goodall and others, for the purpose of having the judgments referred to vacated and annulled and the defendants enjoined from exercising any rights thereunder. As stated by petitioner, this case is now pending in the court of appeals for the Indian Territory, on the appeal of complainants. A similar bill was also filed in the central district of the Indian Territory against one Arnold and others. It is not perceived, however, that these suits have any bearing upon the present case, except as illustrating and emphasizing the belief of the Choctaw and Chickasaw nations, and the members thereof, that great wrong and injustice had been done them through the action of the United States courts by admitting the persons referred to to citizenship.

This and other matters being called to the attention of the Secretary of the Interior, that officer directed the Dawes Commission to negotiate a supplemental treaty or agreement with the Choctaw and Chickasaw nations. Such an agreement was made between the representatives of the United States and the two nations on the 7th of February, 1901. In transmitting it to Congress the Secretary said that experience had demonstrated that the previous agreement (known as the Atoka agreement), ratified by the act of June 28, 1898, was faulty and did not work with satisfaction to the Indians or the public, and that there was pressing reason for supplementing it by a new and further agreement; and, referring to the citizenship judgments

rendered by the United States courts in the Indian Territory, he observed:

> *Believing that the questions affecting the validity and rectitude of these judgments deserved judicial investigation and scrutiny*, article 8 has been rewritten, as shown in the amended draft of the agreement, so as to provide for a fair, speedy, and final decision of these questions by judicial tribunals.

The agreement of February 7, 1901, was not transmitted in time to be acted upon by Congress at that session; and subsequently the Secretary of the Interior directed the Dawes Commission to negotiate another agreement along the same lines for transmittal to the Fifty-seventh Congress at its first session. This latter agreement, which provided for the creation of the Choctaw and Chickasaw Citizenship Court, and authorized the review of the citizenship judgments in question, was concluded between the representatives of the United States and the Choctaw and Chickasaw nations March 21, 1902, and ratified and confirmed by the act of Congress of July 1, 1902 (32 Stat., 641). The material provisions thereof are as follows:

> SEC. 27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the acts of Congress approved June 28, 1898 (30 Stat., 495), and the act of Congress approved May 31, 1900 (31 Stat., 221), except as herein otherwise provided:
>
> *Provided*, That no person claiming right to

enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896, instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

* * * * *

SEC. 31. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceeding in such courts being given to each of said nations; and it being insisted by said nations that in such proceedings notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw Citizenship Court

hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained, as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of

either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings, and, upon the filing in such citizenship court of the files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

SEC. 32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly, or by either of them acting separately, at any time within six months after this agreement is finally ratified. In the exercise of such appellate

jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted, and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two, and thirty-three hereof shall go into effect immediately after the passage of this act of Congress.

SEC. 33. A court is hereby created to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to

the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process, and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers, and documents, the attendance of witnesses, and in punishing contempt. Except where herein otherwise expressly provided, the pleadings, practice, and proceedings in said court shall conform, as near as may be, to the pleadings, practice, and proceedings in equity causes in the circuit court of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. * * * The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certificates. *The judgment of the citizenship court in any or all of the suits or*

proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States.

It will be observed that the proviso to section 32 provides "that paragraphs 31, 32, and 33 shall go into effect immediately after the passage of this act by Congress." But the entire act, so far as it related to the Choctaw and Chickasaw nations, was ratified by a majority of the legal voters of those two nations, at an election held in accordance with the provisions of secions 73 and 74 thereof, on September 25, 1902.

The Choctaw and Chickasaw Citizenship Court having been organized as provided by paragraph 33 of the act, the Choctaw and Chickasaw nations, in virtue of the authority given by paragraph 31, filed therein a bill in equity against J. T. Riddle and nine other persons, as representing all others similarly situated, for the purpose of having the citizenship judgments rendered by the United States courts in the Indian Territory set aside and annulled for the reasons specified in the latter paragraph.

The defendants—and others similarly situated who, upon their application, were made parties to the suit—

filed answers, all of which (as appears from the opinion of the court) admitted that notice was served upon but one of said nations, and that the citizenship cases appealed from the Dawes Commission were tried *de novo* by the United States courts, but asserted, notwithstanding, the validity of all such proceedings.

On December 17, 1902, the Citizenship Court entered its final decree in this test case, in which, after reciting that "due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity to law," and that "said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants who desired to be heard were heard," it was held that notice to each of the Choctaw and Chickasaw nations of the proceedings in the United States courts in the Indian Territory, acting under the act of June 10, 1896, admitting persons to citizenship, or to enrollment as citizens, in those nations respectively, was indispensable; and that those courts should not have reviewed such cases *de novo*, but should have confined their proceedings to a review of the action of the Dawes Commission upon the papers and evidence submitted to that Commission. It was accordingly ordered, adjudged, and decreed that all of said judgments "in favor of the ten defendants named in the bill in this proceeding, as well as to those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid in favor of all persons similarly situated," be set aside, annulled, and vacated.

Among those "similarly situated" was the petitioner, U. S. Joins, who had been adjudged to be a member of the Chickasaw tribe of Indians by the United States court for the southern district of the Indian Territory, March 8, 1898, upon an appeal taken from the decision of the Dawes Commission denying his application.

ARGUMENT.

I.

No case justifying the issuance of a writ of prohibition is presented.

The specific purposes for which a prohibition is sought are to prevent the Choctaw and Chickasaw Citizenship Court from "giving further effect" to its decree in the test case, and to restrain it from certifying a copy of that decree to the Dawes Commission.

1. As to the latter object, it is sufficient to say that it appears from the return filed by the Citizenship Court (par. 1) that, although not required to do so by the statute, a copy of its decree in the test case was certified and delivered by it to the Dawes Commission prior to the filing of the petition herein.

2. The decree in the test case has already had its full effect by operation of law, and is now entirely beyond the control of the Citizenship Court. The test suit, which the statute declared should be "confined to a final determination of the questions of law here named," was fully and finally completed when the court rendered a decree in accordance with its conclusions upon those questions. By that

decree the judgments of the United States courts in the Indian Territory, which the Citizenship Court had under review, were annulled, vacated, and set aside. No further action in that suit was required of the Citizenship Court, the decree being self-executing.

The proceedings provided for by the act (sec. 31), "in the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized," are not only separate and distinct from the test suit, but wholly dependent upon the voluntary action of each and every individual whose judgment was so annulled and vacated.

The statute merely affords an opportunity for those whose judgments were set aside by the decree in the test suit to have their cases reviewed by the Citizenship Court. It was discretionary with each individual concerned whether this opportunity should be availed of. If not, the decree in the test case remains a final and complete adjudication of his rights. If he transferred his case, such proceeding on *his* part certainly could not be said to be an effort *by the court* to give further effect to its decree in the test case. Besides, the proceedings on such transfer might result in his admission to citizenship, thus practically reversing the decree in the test suit so far as his particular case was concerned.

At the time of filing his petition herein the petitioner, Joins, had not made application for the transfer of the papers in his case from the United States court having control of the same to the Citizenship Court.

Since then, however, according to the return of that court (par. 2), he has made such application, and his cause is now pending therein. He has thus placed himself in the attitute of invoking the jurisdiction of the Citizenship Court at the very moment he is seeking to restrain it from taking further proceedings for the enforcement of its decree in the test case. Or, stated a little differently, he has himself instituted the very proceeding which his petition prays to be restrained.

It is manifest that the real object of petitioner is not to prevent the doing of some act which is about to be done by the Citizenship Court, but to have this court review and undo that which has been fully and finally completed, namely, the decision of the Citizenship Court in the test case. But this court has held that the writ of prohibition can not be used for such a purpose. (*United States* v. *Hoffman*, 4 Wall., 158.)

The test suit is a completed fact, and "prohibition will not lie after the cause is ended." (*Hall* v. *Norwood*, Siderfin, 166, cited in *United States* v. *Hoffman*, *supra*.)

The writ of prohibition can not be made to serve the office of a writ of error.

> It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise. A prohibition can not be made to perform the office of a proceeding for the correction of mere errors or irregularities. (*Ex parte Ferry Co.*, 104 U. S., 519, 520.)

It will be observed that section 31 of the act in question contains a proviso that the test suit therein authorized "shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment was wrongfully obtained, as provided in the next section;" and that by the "next section" (sec. 32) Congress provided for the contingency of the Citizenship Court deciding the test suit adversely to the Choctaw and Chickasaw nations, by giving those nations, acting jointly or separately, a right to appeal the judgments in question to the Citizenship Court, which, in the exercise of the jurisdiction thus conferred, was "authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine *the very right of the controversy.*"

Section 32 further provides that "such Citizenship Court shall have like appellate jurisdiction and authority over judgments rendered by such courts under the said act *denying* claims to citizenship or to enrollment in either of said nations; notice of such appeals by citizenship claimants to be served upon the chief executive officer of both nations."

It thus appears that by the act in question Congress endeavored to accord an equal measure of right to all parties concerned, its only purpose being to have "the

very right of the controversy" determined. It is also clear that the decision in the test suit, whether in favor of one party or the other, was to be equally binding upon both and final and conclusive in respect to the subject-matter thereof; and that any further proceedings under the act would be separate and distinct from that suit, the initiative in either case resting upon the defeated party.

It should, perhaps, be noted that by the amendatory act of March 3, 1903 (32 Stat., 995), it was provided that all causes transferred to the Citizenship Court under section 31 of the act of July 1, 1902, should be tried, determined, and disposed of the same as if appealed to such court under section 32 of said act. The amendatory act also provided that this court might transfer to the Citizenship Court the Choctaw and Chickasaw citizenship cases appealed here from the United States courts in the Indian Territory during the year 1898.

II.

A prohibition would obstruct the action of the political department of the Government.

The Choctaw and Chickasaw Citizenship Court, like the Dawes Commission, is a political agency created by Congress in furtherance of the plan outlined in the act of March 3, 1893 (27 Stats., 645), namely, the extinguishment of the national or tribal title to lands within the Indian Territory "with a view to such adjustment, upon the basis of justice and equity, as may, with the consent of such nations or

tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." (*Stephens* v. *Cherokee Nation*, 174 U. S., 446.)

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 308) this court said:

> The power existing in Congress to administer upon and guard the tribal property, and the power being *political* and *administrative* in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, *and is not one for the courts.*

The political nature of the measures adopted by Congress for the control and betterment of the Indian tribes within the United States, and its exclusive authority in respect thereto, was again affirmed in *Lone Wolf* v. *Hitchcock* (187 U. S., 558, 567), in which it was said:

> *Plenary* authority over the tribal relations has been exercised by Congress from the beginning, and the power has always been deemed a *political* one, *not subject to be controlled by the judicial department of the Government.*

In re Cooper (138 U. S., 404) this court entertained an application for a writ of prohibition to the district court of Alaska in an admiralty proceeding, holding that in such case it came within section 688, Revised Statutes; but upon final hearing (143 U. S., 472) declined to issue the writ, upon the ground that the record showed jurisdiction in the Alaskan court. The

court stated, however, that it might have rested its denial "upon the well-settled principle that an application to a court to review the action of the political department of the Government * * * should be denied."

III.

Having no appellate jurisdiction over the Choctaw and Chickasaw Citizenship Court, this court can not issue a writ of prohibition thereto.

In *Ex parte Gordon* (1 Black, 503, 506) the court said:

> A prohibition can not issue from this court in cases *where there is no appellate power given by law*, nor any special authority to issue the writ.

See also Foster's Fed. Prac., vol. 2, sec. 362.

The "special authority" of this court to issue a writ of prohibition is limited to the district courts of the United States when sitting as courts of admiralty. (Rev. Stat., sec. 688.)

Ex parte Christy, 3 How., 293.
Ex parte Gordon, 1 Black, 503.
Ex parte Easton, 95 U. S., 68.
Ex parte Phoenix Ins. Co., 118 U. S., 610.

No appellate power has been conferred "by law" upon this court over the Citizenship Court. On the contrary, the act creating it declares that all its judgments and decrees shall be final (sec. 33).

The Citizenship Court is not a "constitutional" court, in which the judicial power of the United States referred to in article 3 of the Constitution may be

vested, but a "legislative" court, created by Congress in virtue of the general sovereignty of the United States over all territory within its limits, whether occupied by Indian tribes or not.

> *American Ins. Co.* v. *Canter*, 1 Pet., 321.
> *United States* v. *Kagama*, 118 U. S., 380.

It is a special tribunal, created for a particular purpose, and will expire by limitation, in any event, on December 31, 1904. (Amend. act, March 3, 1903, 32 S at., 995.)

Not being a "constitutional" court, and, unlike the regular Territorial courts, possessing no general law and equity jurisdiction, the question whether this court can issue a writ of prohibition thereto in the exercise of its "inherent general power" can not arise. (*In re Vidal*, 179 U. S., 126.)

In re Vidal was an application for leave to file a petition for certiorari to review the proceedings of a military tribunal established by a general of the United States Army while in supreme command in Porto Rico. In denying the application, this court, referring to section 14 of the judiciary act of 1789 (sec. 716, R. S.), which authorizes the Supreme and other Federal courts "to issue all writs, not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the usages and principles of law," said:

> This court is not thereby empowered to review the proceedings of military tribunals by certiorari; nor are such tribunals courts with

jurisdiction in law or equity within the meaning of those terms as used in the third article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power can not arise in respect of them.

IV.

The legislation in question is constitutional.

The history of this legislation shows that it was passed by Congress, at the solicitation and with the consent of the Indians concerned, for the purpose of protecting them against fraud and wrong. Its power to that end is unquestionable (*United States* v. *Kagama*, 118 U. S., 375), and, as has been shown, the manner of its exercise is a matter of legislative discretion and can not be controlled by the courts (*Cherokee Nation* v. *Hitchcock*, 187 U. S., 308; *Lone Wolf* v. *Hitchcock*, id., 565).

Its unconstitutionality is asserted, however, on the ground that it is an attempt on the part of the legislative branch of the Government to disturb vested rights by setting aside the final decrees of a court of competent jurisdiction.

Upon this point the language of this court in *Stephens* v. *Cherokee Nation* would seem to be conclusive (174 U. S., 477–478):

> The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested

rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms the mere fact that the legislation is retroactive does not necessarily render it void.

And while it is undoubtedly true that legislatures can not set aside the judgment of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. (*Calder* v. *Bull*, 3 Dallas, 386; *Sampeyreac* v. *United States*, 7 Pet., 222; *Freeborn* v. *Smith*, 2 Wall., 160; *Garrison* v. *New York*, 21 Wall., 196; *Freeland* v. *Williams*, 131 U. S., 405; *Essex Public Road Board* v. *Skinkle*, 140 U. S., 334.)

The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort can not be questioned unless in violation of some prohibition of that instrument.

> In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of reexamination by a higher court, though subsequently authorized by general law to exercise jurisdiction.

The principles thus announced are supported by the subsequent cases of *Cherokee Nation* v. *Hitchcock* and *Lone Wolf* v. *Hitchcock*, above cited.

The decision in the Stephens case, it will be observed, was confined entirely to a determination of the constitutionality of the legislation of Congress in respect to citizenship and the allotment of lands in the Indian Territory. Assuming, *without determining*, that the act of June 10, 1896, authorized the United States courts to review *de novo* the cases appealed from the Dawes Commission, the authority of Congress to authorize such a review was affirmed, and the legislation under consideration declared to be, in general, valid and constitutional. The question of notice was not even mentioned in the opinion in that case. The act of July 1, 1902, therefore, which provides for a spe-

cific inquiry by the Citizenship Court into the validity of the methods of procedure adopted by the United States courts in the citizenship cases appealed thereto from the Dawes Commission, and for a review of such cases upon their merits, in no way affects the judgment in the Stephens case. In fact, it but supplements the action of this court in that case, and merely serves to complete the purpose of Congress—manifest through all its legislation—to have "the very right" of this controversy determined.

V.

The writ of certiorari being asked merely in aid of the writ of prohibition, must be denied *pro forma*, no grounds for the issuance of the latter writ being presented.

HENRY M. HOYT,
Solicitor-General.

OCTOBER, 1903.

O

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 12, Original.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

FILED AUGUST 24, 1903.

1 In the Supreme Court of the United States, October term, 1902.

Number 14, Original.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.

Reply, Answer and Return to the Rule and Order to them issued, of Spencer B. Adams, Chief Judge; Walter L. Weaver, Associate Judge; Henry S. Foote, Associate Judge, and James B. Cassada, Clerk of the Choctaw and Chickasaw Citizenship Court, to show cause why writs of prohibition and certiorari should not be granted against them as prayed for by the petitioner.

And now comes Spencer B. Adams, chief judge; Walter L. Weaver, associate judge; Henry S. Foote, associate judge, and James B. Cassada, clerk of the Choctaw and Chickasaw Citizenship Court, and by way of reply, answer, and return to the rule and order to them issued by this honorable court on the 23rd day of March, A. D. 1903, to show cause before said court, at the city of Washington, on Monday, the 19th day of October, 1903, at 12 o'clock noon of that day, or as soon thereafter as counsel "can be heard," why writs of prohibition and certiorari should not be granted against them and each of them, as prayed for in the petition of U. S. Joins, filed in said court at the October term, 1902, thereof, on the 6th day of March, 1903, respectfully submit that the petitioner should not be granted the relief prayed for:

1. Because the case of the Choctaw and Chickasaw nations or tribes of Indians against J. T. Riddle and others, referred to in the notice of said respondents by said petitioner that he would on the 13th
2 day of March, 1903, or as soon thereafter as counsel could be heard, ask leave to file his said petition against them praying for writs of prohibition and certiorari, and upon which the rule and order to show cause was made by this honorable court on the 23rd day of March, 1903, was finally determined by said Choctaw and Chickasaw Citizenship Court on December 17th, 1902, the opinion therein having been rendered by said court on that day, and the judgment therein, in accordance with said opinion, having been duly given, rendered, made, and filed, and delivered to the Commission to the Five Civilized Tribes on January 15th, 1903; when in truth and in fact the case now pending against respondents in this honorable court, viz, "No. 14, original, October term, 1902, ex parte, in the matter of U. S. Joins, petitioner," in which the said Joins seeks to have this honorable court issue a writ of prohibition against the Choctaw and Chickasaw Citizenship Court, prohibiting it from certifying its judgment in the test case, known as the Riddle case, was not instituted until the 6th day of March, 1903, long after said test case, known as the Riddle case, had been finally determined and judgment rendered, filed in court, and certified as aforesaid.

By reference to the act of Congress approved July 1, 1902 (32 Stats. at Large, page 641), it will be seen that in providing for the trial and determination of the said test suit the Choctaw and Chickasaw Citizenship Court was given no further power in that behalf and matter and test suit than to give, make, and render judgment upon the two points

in said act provided for, and that the determination of either of said points in favor of said nations or tribes necessarily declared the
3 citizenship judgments rendered by the United States courts in the Indian Territory, for the central and southern districts thereof, null and void; said Joins, among others, having such a judgment thus affected.

A copy of the opinion of the Choctaw and Chickasaw Citizenship Court in said test suit is hereto attached, marked "Exhibit A."

There is nothing in the judgment of said Citizenship Court in the test case, known as the Riddle case, nor did or does the law in that behalf authorize said court to include or place in said judgment anything, by any command or order of said Citizenship Court, to affect or control the acts, or any act, or conduct of the Commission to the Five Civilized Tribes, and therefore, when that judgment was certified by said Citizenship Court, as a matter of advice merely, and not of command, to the Commission to the Five Civilized Tribes, the whole matter had passed beyond the jurisdiction and control of the Citizenship Court, so far as the said test suit was and is concerned, as nothing further remained to be done in respect thereto by said Citizenship Court, as not even an execution for costs could be issued, the officers of said court being prohibited from charging or collecting any costs, and the marshal's fees and those of witnesses were and are to be paid by the respective parties, and in advance, and furthermore no provision exists or was made by the law creating said court for the issuance of any execution for costs.

2. Because after said Joins had instituted the proceeding by petition herein, he, on the 10th day of March, 1903, voluntarily instituted his suit in said Citizenship Court, by way of appeal as provided in the act of July 1, 1902, aforementioned, asking and praying said court
4 to assume jurisdiction thereof and to try his said case on its merits as provided in said act of July 1, 1902, and as amended March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," which became a law on said last-mentioned date, and now, after having so proceeded to pray this Citizenship Court to try his case on the merits, and the same still remains, as prayed for by him, on the docket of said Citizenship Court, and at issue, he persists in his efforts to have this honorable court issue an extraordinary writ or writs to prevent the Citizenship Court from trying the very case which he has prayed it to hear, try, and determine, the same having been instituted voluntarily and freely by him and still remaining for trial on said docket of said court.

3. Because the said Choctaw and Chickasaw nations or tribes of Indians have, in accordance with its provisions, ratified the said act of July 1, 1902, by their vote at a legal election held on the 25th day of September, 1902, and the provisions of the agreement and treaty between the United States and said nations or tribes of Indians, created the Citizenship Court, the same being both an act of Congress approved by the President of the United States and a treaty ratified not only by the authorized treaty-making body of said tribes, but by the individual

members of both the said tribes on the 25th day of September, A. D. 1902. And inasmuch as the petitioner is necessarily an Indian, claiming rights as such, or nothing, for the purpose of this proceeding, he is bound by the acts of his tribe, of which he claims to be a member, in voting for and thereby ratifying, in all respects, said agreement and treaty.

If the petitioner is, as he claims, an Indian, he is absolutely under the control of the political power of the Government of the United States, and bound by the acts of Congress, and still further bound by the acts of the tribe of which he claims to be a member, by means of both of which agencies the Citizenship Court was brought into existence.

The tribes referred to above have voted to ratify the agreement and treaty, and thereby confirmed the validity of the act of Congress of July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court, and the petitioner is forever bound thereby.

The petitioner has voluntarily and of his own free will and accord sought the jurisdiction of the Choctaw and Chickasaw Citizenship Court, and prayed that court to adjudicate and determine his rights on their merits. It is within his power, at any time, to rid himself of any action on the part of the said Citizenship Court in the premises, by dismissing his suit, and declining further to invoke the jurisdiction of that tribunal, and withdrawing from its power and control any adjudication in that behalf, thereby exercising his right to a speedy remedy to avoid its jurisdiction and adjudication.

The petitioner has placed himself in, and remains in, the attitude of a litigant seeking to have the Choctaw and Chickasaw Citizenship Court adjudicate his rights, and then attempts in this proceeding, when such adjudication is about to take place, to have this honorable court prohibit the action of the Choctaw and Chickasaw Citizenship Court, whose jurisdiction and action he has prayed for, under the act of July 1, 1902, and the amendment of March 3, 1903, aforementioned.

Wherefore it is respectfully submitted that the petitioner is not entitled to any relief at the hands of this honorable court.

SPENCER B. ADAMS,
Chief Judge.

WALTER L. WEAVER,
Associate Judge.

HENRY S. FOOTE,
Associate Judge.

JAMES B. CASSADA,
Clerk of the Choctaw and Chickasaw Citizenship Court.

7 EXHIBIT A.

In the Choctaw and Chickasaw Citizenship Court sitting at South McAlester, in the Indian Territory.

December term, 1902.

THE CHOCTAW AND CHICKASAW NATIONS OR Tribes of Indians, plaintiffs,
vs.
J. T. RIDDLE, ET ALS., defendants.

This is a proceeding instituted in this court by the Choctaw and Chickasaw nations or tribes of Indians, against the defendant, J. T. Riddle, and nine others, who are similarly situated. The plaintiffs filed a bill in equity in this court, by virtue of section 31, of an act entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes, approved July 1, 1902, said section being as follows:

"It being claimed and insisted by the Choctaw and Chickasaw nations that the United States Courts in the Indian Territory, acting under an act of Congress, approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such
8 courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately, and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw Citizenship Court, hereinafter named, seek the annullment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship, or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit, as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be

confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any
9 charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory, was wrongfully obtained as provided in the next section. In the event said citizenship judgments, or decisions, are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings, and upon the filing in such citizenship court of the files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

The plaintiffs, after setting out in their bill that certain lands, situated in the Indian Territory and embracing that portion known as the Choctaw and Chickasaw nations, as belonging to these two tribes, and that by virtue of treaty stipulations heretofore entered into on the part of the United States and these two tribes of Indians, said lands are held in common by the members of these two tribes, and they further allege that these ten defendants, and several thousands of others similarly situated, have been admitted and placed upon the rolls of these two nations
10 as Indian citizens, by virtue of certain alleged judgments or decrees of the United States courts, for the central and southern districts of the Indian Territory, under the act of Congress approved on the 10th day of June, 1896; and by virtue of these said judgments these defendants, and all of those similarly situated, are insisting upon enforcing said alleged judgments or decrees, and if same are enforced by allotment to them of an equal share of the lands and moneys of said tribes, it will wrongfully deprive the members thereof of property to the value of many millions of dollars, and thereby proportionately decrease the share which each member would otherwise receive.

The plaintiffs further allege, that all of the judgments of the said United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, are illegal and void; that no valid judgments, affecting said lands and moneys, could in any event, have been rendered without notice to both of said nations, or tribes; and further allege that in no case in which judgments were rendered purporting to admit any of said defendants to citizenship in either of said nations or tribes was notice given of the pendency of said proceedings to each of said nations or tribes, and that in no case was judgment taken against both of said nations, or tribes; and that due and lawful notice to each of said nations, or tribes, was indispensable to the rendition of valid judgments. Plaintiffs further allege, that the proceedings in the United

States courts in the Indian Territory, under said act of Congress approved June 10, 1896, in the rendition of said alleged decrees, should have been confined to a mere review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and that said court should not have tried said cases de novo, and that the action of said courts in trying said cases de novo, and in rendering the alleged judgments, was illegal and void; and
11 that all of said evidence of a documentary nature, which has become a part of the record of said courts in said cases, was unlawfully taken, and that for that reason all of said proceedings are of no force and effect. Plaintiffs further allege that they have no adequate remedy at law by which they can redress the great wrong threatened them, and they therefore pray this court to enter its decree, declaring all such judgments rendered by the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, illegal and void, and ask this court to declare the proceedings of said court in trying said cases de novo, in which said judgments were rendered upon appeal from the Commission to the Five Civilized Tribes, illegal and void, and of no force and effect, etc. The plaintiffs further attach to their bill in equity a judgment rendered by the United States court for the central district of the Indian Territory in the case of Elizabeth Casey et al. against the Choctow Nation, a party who obtained judgment under the act of June 10, 1896. The attachment is marked "Exhibit A," and they ask that it be taken as a part of their complaint, as bearing out their contention that only one nation was served with notice, and that the judgments were taken against one nation alone.

This judgment is as follows:

EXHIBIT A.—*Copy of order of court.*

UNITED STATES OF AMERICA,
Indian Territory, central district, ss:

In the United States court in the Indian Territory, central district, at a term thereof begun and held at South McAlester, in the Indian Territory, on the 24th day of August, A. D. 1897, present, the
12 Honorable Wm. H. H. Clayton, judge of said court. The following order was made and entered of record, to wit:

ELIZABETH CASEY ET AL. *vs.* CHOCTAW NATION. } 25. Judgment.

On this 24th day of August, 1897, this cause came on to be heard upon the pleading and evidence produced herein, and the court being well and sufficiently advised in the premises, doth find as follows:

That Elizabeth Casey, aged 58 years; her son, John Casey, aged 25 years; her son, Joshua Casey, aged 23 years; her daughter, Phebe Garrett, aged 37 years; her grandson, Wm. Garrett, aged 19 years; her grandson, John Garrett, aged 16 years; her grandson, Jesse Garrett, aged 12 years; her granddaughter, Dora Garrett Cheatam, aged 17 years; her granddaughter, Mandy Garrett, aged 4 years; her great-granddaughter, Venice Cheatam, aged 1 year; her granddaughter, John Ann Casey, aged 16 years, are Choctaw Indians by blood and have been born and reared in the Choctaw Nation, and are citizens and residents of

the Choctaw Nation, and that all of said persons are entitled to be enrolled on the citizenship roll of the Choctaw Nation, and as such citizens they and each of them are entitled to all the rights, privileges, benefits, and immunities of Choctaw citizens of said Choctaw Nation, and all such rights and privileges are hereby decreed to them.

It is further ordered and adjudged by the court that the decision of the Commission to the Five Civilized Tribes of Indians, by which the application of the parties appellant was denied, and from which decision these appellants appealed as provided by law, be, and the same is hereby, reversed, and it is ordered by the court that said Commission shall
13 put the names of these appellants on the rolls prepared or to be prepared by it, of citizens of the Choctaw Nation by blood.

It is further ordered by the court that the clerk of this court transmit under his official seal to the said Commission for the Five Civilized Tribes of Indians a true copy of this judgment, which said certified copy shall operate and be taken as a mandate from this court to said Commission.

It is further ordered and adjudged by the court that these appellants have and recover of and from the Choctaw Nation all their costs in this behalf expended.

(Endorsements.)

The within is a true copy from the record of an order made by said court on the 24th day of August, A. D. 1897.

(Signed) E. J. FANNIN, *Clerk*

Filed September 6, 1897.

H. M. JACOWAY, *Sec'y.*

No. 75–2.

No. 25—E. Casey et al. vs. Choctaw Nation. Copy of order of court.

MUSKOGEE, I. T., *Sept. 24, 1902.*

I, Tams Bixby, acting chairman of the Commission to the Five Civilized Tribes, do hereby certify the foregoing to be a true copy of a certified copy of an order made by the United States court in Indian Territory, central district, South McAlester, I. T., on the 24th day of August, A. D. 1897, in the case of Elizabeth Casey et al. vs. Choctaw Nation, No. 25, as the same appears on file with the records of the Commission to the Five Civilized Tribes.

(Signed) TAMS BIXBY,
Acting Chairman.

Defendants filed an answer to the plaintiffs' bill in equity, in
14 which they admit the judgments described in said bill in equity were rendered by the courts mentioned in said bill in equity, under and by virtue of the act of Congress approved June 10, 1896, but deny that said judgments are illegal and void. They admit that only one nation was served and that the judgments were taken against only one nation, but insist that both of said nations were not necessary parties, and that it was not necessary to serve notice of the pendency of said suits, or the notice of application for such citizenship presented to the Commission of the United States to the Five Civilized Tribes, from which appeal was taken to the said court.

Defendants further insist that under and by virtue of the act approved June 10, 1896, and all other laws and treaties between the Choctaw and Chickasaw nations, or tribes of Indians, that no notice was necessary to have been given to have prosecuted the application of the defendants for citizenship, and that no judgment against both of said nations was necessary and proper, under the law, to recognize the rights of these defendants in and to citizenship or status recognized or established by virtue of said judgments.

And answering the other allegations in the bill in equity, the defendants admit that the United States courts for the central and southern districts of the Indian Territory, rendering such judgments, under the act of June 10, 1896, tried the cases de novo upon an appeal from the Commission to the Five Civilized Tribes, known as the Dawes Commission; but insist that that was the manner in which they should be tried, and deny that said judgments, by reason of the fact that said court heard evidence in addition to that heard before said Commission and tried said cases de novo, are irregular and illegal, and deny that such trials de novo rendered such judgments void, as alleged in said bill in equity. The defendants admit the material facts alleged in the plaintiffs' bill,
15 but insist that upon the facts as alleged, these are valid judgments. They contend in their pleadings, as well as in their arguments, that, under the act of June 10, 1896, authorizing the Dawes Commission to hear and determine the application of all persons who might apply to them for citizenship in said nations, it was necessary to give but one nation notice, and that the trials should have been had de novo, as they were had, before the United States courts.

By virtue of the provision of section 31 of the act of July 1, 1902, Polly Hill and numerous other parties, who claim that they are similarly situated to the ten defendants named in the original bill, upon their application, were made parties to this proceeding, all of them filing answers to the bill, and, as I understand, admit in their several answers that notice was not served on but one nation, and that the trials in the United States courts for the Indian Territory, upon appeal from the Commission to the Five Civilized Tribes, were de novo.

The attorneys representing the plaintiffs and the attorneys representing the defendants in the original action, as well as those attorneys who represent parties who are similarly situated and in consequence thereof, came in and made themselves party defendants, filed in this court the following stipulation:

In the Choctaw and Chickasaw citizenship court, sitting at South McAlester, December term, 1902.

THE CHOCTAW AND CHICKASAW NATIONS or tribes of Indians, plaintiffs,
vs.
J. T. RIDDLE ET AL., DEFENDANTS.

STIPULATION.

Comes the plaintiffs, the Choctaw and Chickasaw nations, by
16 Mansfield, McMurray & Cornish, their attorneys, and comes J. T. Riddle and the nine other representative defendants, named

in the bill of plaintiff herein as representatives of all other persons similarly situated, by C. B. Stuart, C. C. Potter, J. G. Ralls, W. A. Ledbetter, A. C. Cruse, Thomas Norman, J. C. Thompson, Sylvester Mullen, C. L. Herbert, and Charles McPherren, their attorneys, and file this their stipulation, agreeing that this court may consider as before the court for consideration, the constitution of the Choctaw and Chickasaw nations or tribes of Indians and all their printed laws passed by their legislatures or general councils from time to time, together with all the treaties made and entered into by said tribes with the United States of America and the rules of the Commission to the Five Civilized Tribes in 1896. This stipulation, however, shall not be taken as an admission of either party plaintiff or defendant, as to the validity of any of said constitutions or legislative acts of the Choctaw or Chickasaw nations or of any of the treaties aforesaid, it being intended that all proper exceptions to the legality of any of said matters so judicially taken notice of, shall be open for argument and discussion by either party.

Attorneys for plaintiffs: Mansfield, McMurray & Cornish.

Attorneys for defendants: C. B. Stuart, A. C. Cruse, W. A. Ledbetter, C. L. Herbert, C. C. Potter, J. G. Ralls, Chas. S. McPherren, T. W. Neal, Warner & Buckley, Harley & Lewis, Thomas Norman, J. C. Thompson, and Sylvester Mullen.

Opinion by ADAMS, C. J.:

It will be seen by reference to section 31, of the said act set out in the statement of the case that, so far as this suit is concerned, this court is limited to the consideration of two legal propositions and two
17 alone, and it is expressly confined to these two propositions, to wit: Whether, under the act of Congress, approved June 10, 1896, notice to each of said nations was indispensable; and, second, whether or not the proceedings had in the United States courts in the Indian Territory, under said act of June 10, 1896, should have been confined to a review of the acts of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission. The pleadings and arguments admit there was but one nation served with notice, and also that the trials were de novo. Then we come to the consideration of the questions, Was it indispensable, under the act of June 10, 1896, to give both nations notice, and should the trials have been de novo, or confined to a review of the action of the Dawes Commission?

We will take these questions up in the order in which they come.

First. Was notice, under act of June 10, 1896, indispensable? That is the issue plainly stated. To arrive at an intelligent conclusion of this matter, we deem it right and proper, in considering the meaning of the act of June 10, 1896, to consider why this act was passed. What wrongs did Congress intend to correct, if any? And what remedies, if any, it sought to apply? In considering this we shall look at the legislation that Congress had enacted prior to that time upon this subject, for the purpose of determining why the act of June 10, 1896, was passed, and also what these judgments that were obtained under this said act conferred. What were they dealing with? We shall also take into consideration, in determining these matters as to whether these nations both should have been parties, what rights these judgments conferred, and, whether, as a consequence of these judgments, the parties who

obtained them were entitled to such rights in the property belonging to both nations as would require notice to both nations, in dealing with their property.

18 On March 3, 1893, Congress of the United States passed an act authorizing the President to nominate, and by and with the consent of the Senate, to appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw and Chickasaw nations, the Muskogee or Creek Nation, and the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any land within the Territory now held by any or all of said nations, or tribes, either by the cession of same, or some part thereof, to the United States, or by the allotment and division of the same in severalty among the several nations, or tribes, respectively, as might be entitled to the same; or by such other method as might be agreed upon between the several nations, or tribes, aforesaid, or each of them, and the United States, with a view of such adjustment, upon a basis of justice and equity, as might, with the consent of said nations or tribes of Indians, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a State of the Union, which shall embrace the lands within said Indian Territory. In that act Congress declared the purpose of creating this commission, and to carry out this purpose it enacted that such commission, under such regulations and directions as should be prescribed by the President, through the Secretary of the Interior, should open negotiations with the several nations of Indians, as aforesaid, in the Indian Territory, and should endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each of said nations, tribes, or bands, respectively, as may be agreed upon as just and proper, and to provide for each of said Indians a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be suited to the circumstances under the terms of said agreement; second, to procure the cession, on such terms as shall be agreed upon, of lands not found necessary to be allotted or divided, to the United States.

19 Congress further provided in this same act, that the commissioners—meaning the Dawes Commission—should, from time to time, report to the Secretary of the Interior the progress of its negotiations.

So, we are at once to conclude that the purpose of this act was to send three disinterested persons here as representatives of the Government to negotiate with these five tribes and get them to agree, if they could, to an allotment of these lands, so that each Indian would hold his share in severalty, and thereby have a home; and with the ultimate result of creating a State.

This was the purpose, for Congress has stated as much in the act. We have a right to assume these Commissioners discharged their duty; that they came here and attempted to negotiate with the Five Tribes and made their report to the Secretary of the Interior as they were directed. We find in the statement of the case of Stephens et als. vs. Cherokee Nation, which is found in the 174th U. S., page 445, that the Dawes Commission did make reports to the Secretary of the Interior from time to time. On November 20, 1894, and November 18, 1895, the Commission made reports to Congress of the condition of affairs in the Indian Territory in respect of the manner in which lands were held

by the members of the tribes, and the manner in which citizenship of both tribes was dealt with, finding a deplorable state of affairs, and the general prevalence of misrule.

In the report of November, 1895, the Commission, among other things, said:

"It can not be possible that in any portion of this country government, no matter what its origin, can remain peaceable for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are, therefore, responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the Territory this attempt of a fraction to dictate terms to the whole has already reached its limit, and if left without interference will break out in revolution."

20

And the Commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship and the manipulation of the rolls and procedure in Indian tribunals, said:

"The Commission is of the opinion that if citizenship is left, without control or interference, to the absolute determination of the tribal authorities, with power to decitizenize at will, great injustice will be perpetrated and many good and law-abiding citizens reduced to beggary. And, further, the Commission is compelled to report: that so long as power in these nations remains in the hands of those now exercising it, further efforts to induce them by negotiations to voluntarily agree upon a change that will restore to the people the benefit of tribal property, and that security and order and government, enjoyed by the people of the United States, will be in vain."

We have a right to assume that Congress, in view of these official reports that had just been made to it, with all of these conditions in mind, and also with the purpose of allotting these lands, by passing such legislation as would insure rights to those who were entitled to same, passed the act of June 10, 1896, which is as follows:

"ACT OF JUNE 10, 1896.

"For salaries and expenses of the Commissioners appointed under act of Congress, approved March 3, 1893, and March 2, 1895, to negotiate with the Five Civilized Tribes in the Indian Territory, the sum of forty thousand dollars, to be immediately available; and said Commission is directed to continue the exercise of the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them, and to report from time to time to Congress.

21

"That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after said hearing they shall determine the right of said applicant to be so admitted and enrolled: Provided, however, that such an application shall be made to such Commissioners within three months after the passage of this act.

The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nation or tribe; and, provided further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose rights thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for, and compel the attendance of witnesses, and to send for persons and papers,
22 and all depositions and affidavits and other evidence in any form whatsoever, heretofore taken, where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong; and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, that if the tribes or any person be aggrieved with the decision of the tribal authorities or of the Commission provided for in this act, it or he may appeal from such decision to the United States district court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, at the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose rights may be conferred under this act, and said rolls shall be and are hereby made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members, as they finally approve them, with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the list of members to be filed with the Commissioner of Indian Affairs; and said Commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area, amount, and value of the property leased, and the amount received therefor, and by whom and from whom said property is leased, and is further
23 directed to make a full and detailed report as to the excessive holdings of the members of said tribes and others.

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said territory, and afford

needful protection to the lives and property of all citizens and residents thereof."

We have set out the act of June 10, 1896, fully, because we will have many occasions to revert to it in the consideration of these questions. Before we determine whether notice was indispensable to both nations under that act, we deem it proper to determine what rights were conferred by these judgments; and, if any rights at all, were they such property rights as required notice to both nations? Whether these judgments simply conferred a bare contingent right, that did not mean anything, or whether they did or did not carry with them the right to participate in the tribal property ultimately. (Now, it is conceded by all parties that these persons who obtained their citizenship by virtue of these judgments, under the act of June 10, 1896, acquired all the rights, and were entitled to all the benefits, of those Indian citizens whose citizenship was not in question.)

To determine this question we will see how these lands are held by the Choctaw and Chickasaw tribes, and in doing this we deem it proper to trace their title.

By virtue of stipulations contained in the treaty of 1830, between the United States and the Choctaw Nation or tribe of Indians, and, in lieu of certain property owned by the Choctaw Nation east of the Mississippi River, the United States, through the then President, John Tyler, after reciting some of the causes that led up to the treaty of 1830, made the following grant to the Choctaw Nation:

24 GRANT.

"To all to whom these presents shall come greeting:

"Whereas, by the second article of the treaty, began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th of February, 1831), by the Commissioners on the part of the United States, and the Mingoes, chiefs, captains, and warriors of the Choctaw Nation, on the part of said nation, it is provided that 'The United States, under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation,' a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and to live on it: Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the western boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeable to the treaty made and concluded at Washington City in the year 1825.

"Now, know ye, that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi River;' to have and to hold the same with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended 'to be conveyed' by the

aforesaid article, 'in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it' liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof I, John Tyler, President of the United States of America, have caused these letters to be made patent, and seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington, the twenty-third day of March, in the
25 year of our Lord one thousand eight hundred and forty-two, and of the Independence of the United States the sixty-sixth.

"By the President,

"JOHN TYLER.

"DAN'L WEBSTER,
"*Secretary of State.*

"JOHN C. SPENCER,
"*Secretary of War.*

"T. HARTLEY CRAWFORD,
"*Commissioner of Indian Affairs.*

"Recorded. Volume I, page 43.

"J. WILLIAMSON,
"*Recorder of the General Land Office.*

"Executed in the Bureau of Topographical Engineers.

JOHN J. ALBERT,
"*Col., Corps T. Engineers.*"

Then, in 1837, a treaty was made by the Choctaw and Chickasaw nations, and in Article I of the treaty we find this language:

"It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country" (evidently meaning the country that had been granted to the Choctaws by virtue of the treaty of 1830) "to be held on the same terms that the Choctaws now hold, except the right of disposing of it which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation."

In Article III of the same treaty we find this language:

"The Chickasaws agree to pay to the Choctaws, as a consideration of these rights and privileges, the sum of five hundred and thirty thousand dollars," etc.

26 Then we find, in 1855, a treaty entered into by and between the United States and the Choctaw and Chickasaw tribes of Indians. (This seems to be the first treaty made where the United States and the Choctaw and Chickasaw nations were all parties.) It seems by the preamble of that treaty that strife and dissension had sprung up between the two nations.

In Article I of the treaty of 1855 is found the following:

"The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country."

And then we find this language in the same article:

"And pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands

embraced in the said limits to the members of the Choctaw and Chickasaw tribes, and heirs and successors, to be held in common, so that each and every member of either tribes shall have an equal and undivided interest in the whole."

And we find this provision therein:

"Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

Then article two of this same instrument sets apart a district for the Choctaws, giving the boundaries thereof; and article three provides that the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district.

Article five provides that the members of either the Choctaw or Chickasaw tribes shall have the right freely to settle within the jurisdiction of the other, and shall thereupon be entitled to all the rights, privileges, and immunities of citizens thereof. Article eight provides that, in consideration
27 of the foregoing stipulations, and immediately upon the ratification of this convention, there shall be paid to the Choctaws, in such manner as their national council shall direct, out of the national fund of the Chickasaws held in trust by the United States, the sum of one hundred and fifty thousand dollars. And, in consideration of the relinquishment of claims to lands held by these two nations west of the Mississippi River, the United States, in article ten of said treaty, agrees to pay the Choctaws the sum of six hundred thousand dollars, and the Chickasaws the sum of two hundred thousand dollars; and by article fourteen of this treaty of 1855 the United States further agrees to protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons in opposition to their jurisdiction and laws.

In 1866 another treaty was entered into by the Choctaws and Chickasaws and the United States by which the Choctaws and Chickasaws jointly ceded to the United States Government a part of the territory that had been conveyed to them by grant in consideration of three hundred thousand dollars paid by the United States to the two nations. Article six of the treaty of 1866, providing a means by which a right of way through these lands should be acquired, expressly stipulates that the price to be paid for the lands taken for such right of way should be agreed upon between the Choctaw and Chickasaw nations and the company or companies seeking such right of way and to be approved by the President of the United States.

In article eleven of the treaty of 1866 this provision is found:

"Whereas the lands occupied by the Choctaw and Chickasaw nations and described in the treaty between the United States and the said nations of June 22, 1855, is held by the members of said nations in common under the provisions of said treaty; and whereas it is believed that the holding of said land in severalty," etc.

28 In article fifteen of the same treaty, after providing for the selection of seats of justice and lands for the endowment of schools, colleges, etc., this language is found:

"* * * At the expiration of a time therein named the selection

which is to change the tenure of land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty. * * *"

In article seventeen of the treaty of 1866, after providing that the missionaries who had come to this country should not be deprived or interferred with in the continued occupation of their several missionary establishments, and providing further that should any missionary who had been engaged in missionary labor for five consecutive years prior to this treaty in the nations, or either of them, or three consecutive years prior to the civil war, and who, having absented himself from said nation may desire to return, it is provided that such missionary be allowed to select a quarter section of land for a permanent home for himself and family. And in the same article granting lands to religious societies and denominations it is provided that no land therein granted shall ever be sold or otherwise disposed of without the consent of both nations and the approval of the Secretary of the Interior.

So it will be seen that in the treaty between the two nations in 1837 it is expressly provided that lands shall be held in common by the two nations. By the treaty of 1855, between the two nations and the Government, it is expressly provided that such lands shall be held in common, with this further explanatory provision, "so that each and every member of either tribes shall have an equal, undivided interest in the whole," with a further provision that no part thereof should be sold without the consent of both tribes. And in the treaty of 1866 the same conditions and limitations are incorporated as were in the former treaties referred to.

29 It is a significant fact that in all these treaties, wherever land is mentioned, it is expressly provided that it is held in common by these two tribes. It is a further significant fact that wherever any provision is made for any disposition of the lands it is provided that the price to be paid for same should be agreed upon between the two nations, and the disposition of any of the lands, before taking place, is to be agreed upon by the two nations. Even in the lands donated to the missionaries, who came here and administered to the spiritual needs of the Indian and endured hardships, perils, and dangers incident to such residence at that time, the Indian, while recognizing that wholesome gratitude that must be commended, was so cautious as to the distribution of his property, ingrafted into that treaty that the lands therein granted should not be disposed of except by and with the consent of both nations. When the United States purchased a part of their territory, under the treaty of 1866, it purchased the same not from the Choctaws alone, nor from the Chickasaws alone, but from the Choctaws and Chickasaws, and paid the two tribes therefor three hundred thousand dollars.

We have set out the provisions of these different treaties because we consider it important; and, after a careful consideration of the provisions of these treaties and the legislation above referred to, is there any questioning the fact that this land is held in common by these two tribes, and that each and every member of these two tribes of Indians own an equal, undivided interest in the lands conveyed under the treaty of 1855, and which is now conceded to be all the lands embraced in the territory known as the Choctaw and Chickasaw Nations, in the Indian Territory, except that part heretofore disposed of by them; and the further fact

that no part thereof has ever been disposed of without their joint consent? These treaties mean that or they do not mean anything.

30 That question being settled, our next inquiry is, what rights, if any, did these judgments confer? It is contended by the defendants in this case that they did not confer such rights of property as would require those who were to be affected by the judgments to have notice of the proceedings. We have shown by the legislation of Congress, heretofore set out, the great purpose of Congress in sending this Commission to the Indian Territory, known as the Dawes Commission, was to negotiate with the Indians looking to an allotment of the lands to the individual Indian in severalty, so that a State might be ultimately created, and to secure to each and every Indian in these two nations a sufficient quantity of land to meet his needs. This legislation further shows that this Commission could not form any agreement with the Indians that would accomplish that purpose. The Commission reported these facts to Congress, and the act of 1896 was passed, we may assume, in consequence of these reports.

The Commission, under this act, was authorized and directed to proceed at once to hear and determine the application of all persons who might apply to it for citizenship in any of the said nations, and, after such hearing, they shall so determine the rights of said applicants to be admitted and enrolled. It was necessary before the allotment took place that the applicant should be admitted as a citizen of either one of these tribes; if he was a Choctaw, he must be admitted as a Choctaw citizen; if a Chickasaw, he must be admitted as a Chickasaw citizen; and then, after he was admitted, the act directed that the Commission should put him on the roll. We might ask the question, What was the purpose of this? Why should he be admitted as a citizen and placed on the rolls? Did the Congress of the United States pass this act simply to allow a man to be admitted as an Indian citizen when it conferred no rights? Was it simply to subject the applicant to tribal laws, etc., or did

31 it pass this act for the purpose of seeing who the real Indian was, and placing him on the rolls, so the allotment might take place and the lands be divided in severalty, as it had expressed in the legislation above referred to, was its great desire?

When the applicant was admitted he was placed on the rolls, and then he became entitled to all benefits enjoyed by the Indian whose rights were not in question. Then, did he not become entitled to his individual interest in the common estate as soon as the same was allotted? We are forced to answer this question in the affirmative.

It is admitted by the defendants that these various parties who were admitted to citizenship under these judgments are now in possession of large tracts of land that belong to these two nations. They have enjoyed the benefits, the rents, and profits of these lands since the rendition of these judgments; and they went into possession of same by virtue of the judgments so obtained under the act of June 10, 1896. Then, we might ask, How can it be contended that these judgments did not confer property rights?

Upon the question as to the rights conferred by the admission of a person as a citizen of these two tribes, the learned judge of the central district of the Indian Territory, who tried these cases in said district under

the act of June 10, 1896, in his opinion in the case of F. R. Robinson vs. Choctaw Nation, when he came to discuss the rights of a white man who had been admitted to citizenship by virtue of marriage with an Indian woman, uses this language: "The marriage had vested a title to the lands in him."

Also the learned judge of the southern district of the Indian Territory, who tried these citizenship cases under the act of June 10, 1896, supra, when he came to discuss what rights were conferred upon an United States citizen by his marriage to a Choctaw or Chickasaw woman, and
32 thereby acquiring citizenship in the tribe, uses this language: "Besides, it (meaning marriage) is supposed to carry with it certain property rights."

Chief Justice Fuller says in the Stephens case, above referred to, "these are not absolute vested rights," but we are bound to conclude that they were such rights as gave the applicant, when he was admitted and enrolled, rights in common property. Then, if that be true, was he seeking such right when he made application as would require, under the law, notice to the adverse party, or those who held the property in common, that their property was about to be diminished? that an estate was about to be carved out of the whole? In fact, was not enrollment, as here involved, but a step, and a vital one, looking to the partition or condemnation, so to speak, of a part of the common property of the two nations, the Choctaws and the Chickasaws?

We understand the general rule in equity cases, with reference to parties, to be in accordance with the fundamental principals of justice, that all persons interested in the object of a suit, and whose rights will be directly affected by the decree, must be made parties to the suit. (Exceptions to this rule have been admitted, none of which apply in this case); but in every case there must be such parties before the court as to insure a fair trial of the issues in behalf of all. (McArthur vs. Scott, 113 U. S., page 1031.)

All who are interested in the decree shall be made parties to the proceedings, but the rule is not without exceptions, and it does not apply where parties can not be found, and where great inconvenience would result from its application. Where a person is interested or involved in a suit he should be made a party. (Danbridge vs. Washington, Ex., 2 Peters, p. 454.)
33 In other words, we understand the rule to be, all those whose presence is necessary to a correct determination of the entire controversy must be made parties.

Justice Livingston, in delivering the opinion of the court in the case of Marshall vs. Beaverly, 5 Wheat., 313, uses this language:

"It is not the course of courts of equity to make a decree which is operative directly upon the parties in interest without affording them an opportunity of being heard."

We could quote a great many decisions bearing out this principle, but it is a principle so well settled that we need not spend any time thereon.

Here is a large body of land belonging to these two tribes: Congress, in its various acts, supra, said that it desired to allot this land in severalty. Was the Choctaw Nation interested in who was made a Chickasaw citizen? or, was the Chickasaw Nation interested in who was made a Choctaw citizen? Most assuredly it seems to us they were. The natural

effect of these judgments was to deprive them of a part of their lands; then, under the well-established principles of law, was it not necessary, when the applicant came and presented his application, and an allowance of same, and putting him on the rolls, had the effect of his sharing in the distribution of these lands, then, naturally, why was he not interested in these proceedings so vital to his rights?

The counsel for the defendants contend that the proceedings in this case were on a parallel with the proceedings for naturalization. We can see no kinship between the two. The defendants contend that the decree of the court declaring a person a citizen under the naturalization laws entitled him to preempt land and acquire a homestead in the public
34 domain. That may be true. The Government is then dealing with its own property, and the rights of no third parties intervene, but here the Government is dealing with its wards and with people who own this property. The Government of the United States has not only given them a grant to it, but by solemn treaty has said: "This is your property; hold it in common. It is yours as long as you and your heirs exist, unless you abandon the same." The Government has not only said this to the Indian, but further, that it will protect him from other Indians and white people who attempt to invade his rights.

The defendants argued with considerable earnestness that under the act of June 10, 1896, if notice was necessary to either nation, notice to one was sufficient, and that service on both nations was not necessary, because citizenship had been conferred by each of these nations without the concurrence or intervention of the other, and that the act of June 10, 1896, directed the Dawes Commission that in determining all such applications the Commission should respect the laws of the several nations or tribes. That contention is met by the conceded fact that these nations had become so corrupt, and many people who were entitled to citizenship had been deprived of their rights, and that citizenship had been conferred upon those who were not entitled to it. The Congress of the United States, we have a right to assume, with a knowledge of these facts, and doubtless remembering the provisions of the treaty of 1855, stipulating that the United States Government shall protect these Indians in their rights from invasion of intruders, took from these tribes the right to confer citizenship and placed it in the hands of the agents of the Government, at the same time admonishing these agents to respect, in determining these citizenship questions, all laws of the several nations or tribes. Had Congress stopped there, there might have been some force in this contention, but it went further, and provided that
35 notwithstanding the Commission should respect the laws of the several nations or tribes, added "not inconsistent with the laws of the United States and all treaties with either of said nations or tribes." In other words, it directed the Commission to respect the laws of the several nations or tribes, provided the same were not inconsistent with the laws of the United States.

Now, was conferring citizenship by one nation, and thereby diminishing the property of the members of the other nation—that being the ultimate result—without any notice to that nation affected by the bestowal of such citizenship, inconsistent with the laws of the United States? Was that not depriving the members of that nation, who had a common

interest in the lands of both nations, of their property rights without due process of law? We are forced to the conclusion that it was.

Congress did not stop here, but it went further and provided and directed, in the act of June 10, 1896, the Dawes Commission, in the performance of such duties, shall have power and authority to administer oaths, to issue process and compel the attendance of witnesses, and to send for persons and papers and all depositions and affidavits, in any form whatsoever heretofore taken, where the witnesses giving such testimony are dead, or now reside beyond the limits of said Territory, and further directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, and to protect any of said nations from fraud or wrong. Congress, being so jealous of the rights of these "once powerful but now dependent people," enjoined upon this Commission to use every fair and reasonable means in determining the rights of citizenship or to protect the Indian from fraud or wrong. Was it not reasonable to serve notice on both of these nations, so they could have
36 come into court and contested the rights of those who were seeking to gain an interest in their common property?

As we have said before, the general rule is that all those whose rights are affected by the decree should be made parties to the action; that being true, we are forced to the conclusion that Congress did not intend to prescribe a different rule to be followed when dealing with a helpless and dependent people.

The defendants, in their learned and exhaustive argument, laid down this proposition, and seemed to place considerable stress thereon, that the act of June 10, 1896, in not providing for notice, was equivalent to a declaration by Congress that no notice was necessary in order to carry out its purpose in making a roll of citizenship in the tribes. We do not think that can be the law, but think, in the absence of a declaration in the statute upon this point, that Congress assumed, when it passed the act of June 10, 1896, and was silent upon this point, that the Commission, as well as the courts, would follow the well-established rules and principles of law in these citizenship proceedings that had been conferred upon the Commission and courts to determine. Congress directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong. Mark the language. How could they be protected when they were not given the opportunity of being heard when a part of their property was about to be taken?

The defendants insist that the Supreme Court in the Stephens case, above cited, held that Congress had the power to authorize the Commission to make the rolls in the manner provided for in the act, and that this is equivalent to a declaration by the Supreme Court in that case, that in making the rolls notice to the tribes was not indis-
37 pensable. In insisting upon this contention they, however, admit that the question as to whether notice had been given to both tribes, or either tribe, or as to whether such notice was necessary, was not presented to the Supreme Court. We assume, therefore, that the Supreme Court did not pass upon that question, and especially so when the learned Chief Justice, in delivering the opinion in the

Stephens case, expressly says in that opinion that the court had confined itself to the question as to the constitutionality or the validity of the legislation. If the question of notice had been presented to the Supreme Court, and that court had passed upon that question, of course this court would be bound by its decision.

It is admitted that the question as to whether notice was indispensable to both tribes in the proceedings under the act of June 10, 1896, *supra*, was never raised, either before the Dawes Commission or upon appeal to the United States district courts for the Indian Territory, and, in fact, was never raised in any legal proceeding except in this case.

We deem it just to the Dawes Commission, and also to the United States courts who tried these cases, to say this much.

In the answer of Julia London et als., filed in this cause, it is alleged that this court has no jurisdiction or power to entertain the bill for the purpose of setting aside, cancelling, and annulling the judgments of the United States courts for the Indian Territory, which are set forth in the bill in this case: and they deny that Congress had the right to pass the act of July 1, 1902. Hence they contend that the act of July 1, 1902, is in violation of the Constitution of the United States. These defendants, who set up this question in their answers, as well as many of the other defendants in this proceeding, filed a demurrer to the bill in this case, attacking the validity and constitutionality of this legislation, upon the same grounds as are set up in this answer.

38 After a full and exhaustive discussion of this matter, covering a period of five days, this court overruled the demurrer so filed, and all of them. Therefore, without going into a full discussion of this matter again, we now hold that Congress did have the right to pass the act of July 1, 1902, and every provision thereof; and that the same is not in conflict with the Constitution of the United States, or any of its provisions.

Having determined the first legal question involved in this proceeding, we now come to a consideration of the second proposition: Whether the proceedings in the United States courts in the Indian Territory, under the act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship.

The act of June 10, 1896, with reference to appeals in these cases from the Commission, known as the Dawes Commission, contained this proviso: "Provided, That if the tribe or any person be aggrieved with the decision of the tribal authorities, or the Commission provided for in this case, it or he may appeal from such decision to the United States district court: provided, however, That the appeal shall be taken within sixty days, and the judgment of the court shall be final." It will be observed that there is nothing in the statute itself, declaring in terms that such appeal shall be tried de novo, and, in fact, there is no prescribed mode of procedure specially set out in the act as to the matter of appeals. Then we are to determine what Congress meant when it said by the act of June 10, 1896, that the party aggrieved should have the right of appeal to the United States court; that is, what is meant by the word "appeal," accompanied by the other language of the act. In other words, what

39 kind of an appeal was applicable to the case in hand, as to the procedure to be pursued in determining the case in the appellate tribunal?

The defendants contend that, inasmuch as there was no provision in the act of June 10, 1896, requiring the cases not to be tried de novo, Congress, by the act of June 10, 1896, intended that the trials should have been de novo. In other words, that if Congress had intended that the United States courts for the Indian Territory, in the trial of these appeals from the Dawes Commission, should have been confined to a review of the case, it would have said so in the act itself; and they further contend that the only jurisdiction the United States courts had to try cases appealed to them was to try them de novo. In support of their contention defendants cite the practice of the United States courts in the Indian Territory with reference to appeals from mayors of incorporated towns and United States commissioners therein, showing that in all such appeals the trials are had de novo.

To pass upon this contention we deem it necessary to refer to the acts of Congress authorizing appeals from mayors and commissioners in the Indian Territory, for the purpose of ascertaining whether or not such acts of Congress prescribed how such appeals shall be tried when they reach the United States court, and in doing so we shall set out as much of these statutes as we think bear upon this point.

An act entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States courts in the Indian Territory, and for other purposes," was passed by Congress May 2, 1890, and is found in the United States Statutes at Large, vol. 26, chap. 182, page 81, in which, after providing for the appointment of commissioners and designating what the qualifications of these commissioners shall be, etc., we find this provision:

40 "The provisions of chapter 91 of the Laws of Arkansas regulating the jurisdiction and procedure before the justices of the peace are hereby extended over the Indian Territory. * * *"

And then, in providing how appeals shall be taken from these commissioners: "It is further provided, That appeals may be taken from the final judgments of said commissioners to the United States courts in the Indian Territory in all cases and in the same manner that appeals may be taken from final judgments of justices of the peace under the provisions of said chapter 91."

The chapter 91 which is referred to is found in Mansfield's Digest of the Laws of Arkansas; and in order to determine what procedure is prescribed in appeals from justices of the peace under the Arkansas Statutes, as set out in chapter 91 of Mansfield's Digest, we have examined that provision of the Arkansas law under the head of "Appeals" in that chapter. After providing that any person aggrieved by any judgment rendered by any justice of the peace, etc., and after providing how the appeals shall be taken, we find this provision:

"Upon the record of the justice being filed in the clerk's office the court shall be in possession of the case and shall proceed to hear, try, and determine the same anew, upon its merits, without any regard to any error, defect, or imperfection in the proceedings of the justice."

With reference to appeals from mayors we find the same provision as to appeals from justices; and it will be seen that in the case of appeals

from commissioners of United States courts in the Indian Territory the statute itself prescribes that the trials shall be de novo, and not confined to a review.

The defendants, in their oral arguments, as well as in their printed briefs, cite the case of the United States vs. Ritchie, 58 U. S.,
41 page 524, and seem to rely upon that decision largely in support of their contention, that Congress, by the act of June 10, 1896, intended that these appeals should be tried de novo, and the court should not be confined simply to a review of the action of the Dawes Commission. In fact, the judge for the central district of the Indian Territory seems to have based his authority to try these appeals from the Dawes Commission, under the act of June 10, 1896, upon the decision of the United States Supreme Court in the Ritchie case, supra. We think we are warranted in saying this from the language found in his opinion, as appears, beginning on page 110, in the report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, which is as follows:

"There are upon the dockets of this court, appealed from the Commission to negotiate with the Five Civilized Tribes, known as the Dawes Commission, two hundred and forty-one cases involving the right of citizenship in the Choctaw Nation of about two thousand five hundred applicants. All of these cases have been by my predecessor, Judge Lewis, placed on the equity side of the docket, and in the case of Mary A. Sanders, No. 63, a motion to transfer to the law side of the docket was filed and argued and by him overruled. It is not my purpose in these cases to disturb or go back and open up questions already decided, but to adopt the past rulings of the court and to proceed as rapidly as possible to a final disposition of them. In passing I will remark, however, that it seems to me that the peculiarity of these cases, the many suits brought by persons having a common interest and a common purpose against the same defendants, the difficulties of enforcing the rights by judgment of law, and the many equities claimed by both parties to these suits make them proper cases for a court of equity.

"The question of the jurisdiction of this court to hear and determine these cases has been raised by the pleadings. The counsel on neither side, however, has seen fit to press this question or to point
42 out, either by brief or oral argument, the reasons for this contention. The statute giving the court jurisdiction is plain and I know of no constitutional objections. It has been said, however, that Congress does not possess the power under the Constitution to give to the courts of the United States appellate jurisdiction over the final orders and awards of commissions and other such tribunals. This very question was raised in the case of the United States vs. Ritchie, decided by the Supreme Court of the United States and reported in vol. 58, United States Supreme Court Reports, page 524. In that case the proceedings were originally commenced before a board of commissioners to settle private land claims in California, under an act of Congress of March 3, 1851. Provisions were made by the act, at the suit of the losing party, for an appeal to the United States district court for the northern district of California. The board decided the case in favor of the claimant and against the Government. The United States appealed

in accordance with the provision of the statute to the aforesaid district court, where it was again tried de novo and an appeal regularly taken to the United States Supreme Court. In that court the question of the jurisdiction of the district court to try the case was raised. The contention is stated in the opinion."

Upon an examination of the act of Congress referred to by Judge Clayton, under the provisions of which the decision of the Supreme Court was based, it will be found that the act itself provided that upon an appeal from the Commission to settle the private land claims in California to the United States court, in section 10 thereof, that the United States district court for California should proceed and render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken upon the order of said court in such appeal. So it will be seen in this case, as well as in the cases upon appeal from the
43 United States Commissioners in the Indian Territory, that the acts themselves provided for a trial de novo. It will further be seen, by referring to the act of June 10, 1896, supra, under which the United States courts were proceeding, contained no such provision or direction; it simply provided that if the tribe or any member be aggrieved by the decision of the tribal authorities, or the Commission provided for in this case, it or he might appeal from such decision to the United States district court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final. But it is claimed that the Supreme Court of the United States, speaking through Chief Justice Fuller, in the case of Stephens vs. Cherokee Nation, 174 U. S., page 445, has decided unmistakably that such trial was to be had de novo. If this contention was sound, of course this court would be bound thereby. But let us look at the language used by the learned Chief Justice in delivering the opinion in the Stephens case. His language is as follows:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it exercising only quasi judicial powers, by the transfer of their proceedings and decisions, denominated 'appeals' for want of a better term, to judicial tribunals for examination and determination de novo."

Now, we may ask, what was the first objection to which the Chief Justice referred in stating his views above quoted? It was stated by him thus:

"The question arises whether the judgments made final by the statutes are the judgments of that court in the several districts delineated by the act of March 18, 1895, or of the appellate court herein pro-
44 vided for, which may be referred to later on, since it is objected to in the outset that no appeal from the decisions of the Dawes Commission, or of the tribal authorities, could be granted to the United States court; and furthermore, that at all events it will not be competent for Congress to provide for an appeal from the decrees of the United States courts in the Indian Territory, after such decrees have been rendered and the term of the court expired."

Now, it will be seen here, the learned Chief Justice does not determine that the right and power of appeal, which is treated of above, does, as a matter of fact, conclusively carry with it, in the very terms of the act

conferring the right and power, the right to prosecute an appeal de novo; or that it orders or declares by any act or any language that can bear such a construction that the procedure on appeal is to be as a trial de novo, or that it specifies what the procedure in the appellate court shall be. In addition, the Chief Justice, in his decision in the Stephens case, distinctly declares that the United States Supreme Court had only power, in determining that case, to hear such appeal as he was passing upon, under the statute of 1896, in so far, merely and entirely, as the constitutionality of the act or acts was concerned; but the question of the right of appeal de novo, as was claimed existed to the district courts of the Indian Territory, under the act of June 10, 1896, did not and does not involve any constitutional questions. The learned Chief Justice says that Congress may pass an act constitutionally, commanding a trial de novo in the court above, and goes no further.

It will be observed that the Chief Justice did not say that the act of 1896 meant that the appeal should be de novo, but says that Congress had the right to pass such an act.

The case of Kimberlin vs. Commission to the Five Civilized
45 Tribes, decided in the circuit court of appeals for the 8th circuit, and which is found in the C. C. A., vol. 44, page 109, where some two years after the expiration of the time fixed by the act of June 10, 1896, within which the Commission is authorized to receive applications for citizenship, Mary Jane Kimberlin filed her application and asked that it be passed upon. The Commission held that it had no power to receive or pass upon applications after September 10, 1896. The applicant applied to the United States court for the southern district of the Indian Territory for a writ of mandamus to compel the Commission to entertain her application and admit her. The court denied the petition, and an appeal was taken to the court of appeals for the Indian Territory. Its decision was an affirmance of the decision of the district court, and an appeal was taken to the United States circuit court of appeals for the 8th circuit. Judge Sanborn, in delivering the opinion, among other things says, in speaking of the right of appeal, as given in the act of June 10, 1896:

"It provides for the speedy determination of the questions presented by the various applications, and gives to each applicant the right to a review of the action of the Commission by an appeal to the Federal court."

That is, a looking over of any appeal to the United States district courts of the Indian Territory, in order to determine if any error was committed by said Commission as to law or fact which requires correction. Judge Sanborn further says in this opinion:

"It is conceded that the commissioners are executive officers; it is not their sole duty or chief function to hear and determine controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties who may apply to them for membership in the Five Nations, they are vested with judicial power by the act
46 of Congress; they have authority * * * to use every fair and reasonable means within their reach for the purpose of determining such citizenship, and above all they are empowered to determine the application of all persons who may apply to them for citizenship. This grant of power is plenary; it vests the authority and

imposes the duty on the Commission to hear and decide every question of law and fact which is material to the rights of the applicant to enrollment as a citizen of the nation."

It may further be said, as bearing on the plenary powers of the above-mentioned Commission, that the act of June 10, 1896, further provides, following the portion above construed in the circuit court of appeals, defining the powers of said Commission to hear and determine the questions of citizenship, or to protect any of said nations from fraud or wrong. That is, everything in the power of said Commission was mandatorily directed by Congress to be done, and every reasonable step it could take, in order, as far as lay in its reach, to protect any of said nations from not only fraud, but from any wrong.

It thus appears that in this decision of the court of appeals it is stated upon fair construction that the Commission had judicial powers of a plenary nature. As to procedure, where does the language giving the right of appeal from the decisions even intimate that a review of the same of the question of law or fact are to be heard de novo, either as a matter of procedure or of right, or recommended, even remotely, as we can see? So, then, here we have a commission having plenary rights and powers given by positive law and clear language, to hear and determine all questions of law and fact which might come before it under the terms of the law conferring such jurisdiction, and the right of appeal, as expressed in the act of June 10, 1896, from its decisions, avoiding everything going to declare that the appeal should be heard de
47 novo, as did the statute involved in the Ritchie case and also the statute governing the appeals from commissioners of the United States court, cited by the defendants, giving a right of appeal to a trial de novo, or any language specifying the procedure to be had on such appeal in the court above. It follows, then, that we must determine how such an appeal should have been tried in the United States district courts of the Indian Territory, by interpreting fairly the language of the act of June 10, 1896, giving such appeal to the reviewing court of the last resort. From the language of the act conferring plenary powers as a judicial body upon the Dawes Commission, supra, and also giving a right of appeal from its decisions, as the clause of the act giving the appeal does not distinguish it in any way perceptible to us from the ordinary court having plenary powers to try all cases as to law and fact, of which the act of Congress gives it jurisdiction, it appears clearly that an appeal is to be granted in an ordinary way and manner, as if the appeal had been taken from an ordinary State circuit court to a court of appeals, or from any similar court having plenary powers to try questions of law or fact, to an appropriate appellate court, for review of the action of the court below, having such plenary powers over matters to be heard under its jurisdiction originally.

The members of the Dawes Commission were appointed by the President and confirmed by the United States Senate, and have larger powers than those conferred on the commissioners of the United States courts anywhere, and therefore no parallel can be drawn with the powers of the United States district courts of the Indian Territory, on appeal from such tribunals, the mere creation by appointment of the district judge, with that possessed by the district court on appeal from the Dawes Commission. The United States district court commissioner is the creation

of a direct legislative act of Congress, but having very limited
48 powers compared with those conferred upon the Dawes Commission by the act of Congress giving it such vast powers, and especially under the act we are now considering, to try these citizenship cases; and dignifying the members thereof, not only with a grant of great power, but paying them salaries as great as the judges of the district courts, and their appointment by the President requiring the Senate's concurrence.

In considering the questions raised by the pleadings, we have considered all that part of the constitutions of the Choctaw and Chickasaw notions, or tribes of Indians, and all their laws passed by their legislature and general council from time to time; and also all treaties made and entered into by said tribes with the United States, as well as those treaties entered into between the two tribes; and also the rules of the Commission to the Five Civilized Tribes, in existence in 1896, bearing upon the points at issue, which will be seen by reference to the opinion in this case.

So that in all the various aspects in which this question is to be viewed, considering the case of Kimberlin against the Commission to the Five Civilized Tribes, supra, and all the statutes and decisions we have been able to examine; and in further considering what dignity and power is conferred on the Dawes Commission, as to judicial and other powers, and the method of their appointment and confirmation, we are led to the irresistible conclusion that the appeals from the Dawes Commission, under the act of June 10, 1896, to the United States court in the Indian Territory, should have been confined to a review of the action of the Commission upon the papers and evidence submitted to such Commission and should not have extended to a trial de novo of the question of citizenship. We think every fair construction and intendment of the language of the act, giving the right of appeal to the United States courts for the Indian Territory, leads to this conclusion; and that grave
49 and serious prejudicial error must necessarily be presumed, because the United States courts for the Indian Territory in trying such appeals proceeded without any warrant of law, and therefore the judgments they rendered in the cases at bar, as in all cases where the parties are similarly situated, can not be upheld and should be annulled and declared void.

And as a further confirmation that such ought to be the judgment of this court in this proceeding, the fact that if notice to both tribes was indispensable and in the sense meant in the act of July 1, 1902, it will be remembered that this word "indispensable" has reference as well to the ordinary practice in such cases where a joint and common interest in property is held, as here by both tribes of Indians involved in this case, and also it has reference to what should have been done by the Dawes Commission in carrying out the declaration of Congress properly as to the method of acquiring jurisdiction, and the procedure to be pursued by the Dawes Commission, as set out in the act of June 10, 1896; and this view is further confirmed when it appears that Congress in the 31st section of the act of July 1, 1902, has termed the failure to give both tribes notice, and the hearing de novo by the United States district courts of the Indian Territory, not prescribed by the act giving right of appeal

from the Dawes Commission to the district courts for the Indian Territory, as irregularities claimed and insisted upon by such nations, thus clearly indicating that the Congressional view was and is, that the Dawes Commission having failed to give proper notice of a reasonable kind to both tribes, holding common interests in the lands of a proceeding affecting their joint property rights, and the United States district courts having tried the cases on appeal de novo, the act of June 10, 1896, not ordering it, that such matters not only be matters considered irregular in order that a decree may be made through this court, speaking to
50 the subject, that such irregularities having occurred, the judgments involved here should be annulled and vacated.

In the determination of the questions raised by the pleadings in this proceeding, we have confined ourselves to the two legal propositions raised by the bill, in accordance with section 31 of the act of July 1, 1902, under which this proceeding was instituted, deeming it unnecessary to go into the other questions that are raised by the several answers, because we consider a determination of the two propositions as decisive of all. So, in consideration of all the various aspects of this case, and being of the opinion that, owing to the manner in which the lands are held by the two tribes, that notice to both tribes was indispensable; and being further of the opinion that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to trial de novo of the question of citizenship, we are of the opinion, on account of the errors pointed out, that the judgments rendered by the United States courts for the Indian Territory, under the act of June 10, 1896, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill, as well as to those who have come in and made themselves parties defendants, and all persons so situated should be annulled and vacated, and it is therefore so ordered.

We concur fully and entirely in what is written, said, and declared by Chief Judge Adams in the opinion herein rendered and filed, both as to the reasoning, the conclusions arrived at, and the matters passed on and adjudged.

WALTER L. WEAVER,
Associate Judge.

HENRY S. FOOTE,
Associate Judge.

(Indorsed:) Supreme Court U. S. October term, 1903. Term No., 12, original. Ex parte in the matter of U. S. Joins, petitioner. Return to rule to show cause. Filed August 24th, 1903.

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Supreme Court, U.S.
FILED
APR 29 1902
JAMES H. MCKENNEY,
Clerk

12 Orig.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

EX PARTE IN THE MATTER OF U. S. JOINS, PETITIONER.
NO. [illegible] ORIGINAL.
12

PETITION FOR WRITS OF PROHIBITION AND CERTIORARI TO THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

MOTION BY THE SOLICITOR-GENERAL TO CHANGE RETURN DAY OF RULE TO SHOW CAUSE.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

EX PARTE IN THE MATTER OF U. S. JOINS, PETITIONER.
NO. 14, ORIGINAL.

PETITION FOR WRITS OF PROHIBITION AND CERTIORARI TO THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

MOTION BY THE SOLICITOR-GENERAL TO CHANGE RETURN DAY OF RULE TO SHOW CAUSE.

As the petition herein shows, this case involves the constitutionality of certain provisions of the act of Congress of July 1, 1902 (32 Stat., 641), establishing, in conformity with an agreement entered into between the Commission to the Five Civilized Tribes and the Choctaw and Chickasaw nations, the Choctaw and Chickasaw citizenship court, and authorizing that court to review the judgments and decrees rendered by the United States courts in the Indian Territory pursuant to the act of June 10, 1896 (29 Stat., 321), allowing or denying the application of certain persons for admission into citizenship in those nations.

The early determination of the question thus presented—if, in view of the limited power of this court to issue writs of prohibition, it may be determined upon this application—is of concern to the Government as well as to the tribes and individuals involved. Preliminary to the allotment of lands in severalty to the members of the Choctaw and Chickasaw nations, as provided by the act of July 1, 1902, is the preparation of the rolls of citizens therein, which, in a large measure, is dependent upon the settlement of this vexed question of citizenship. In a letter urging the importance of an early disposition of this case, the judges of the Choctaw and Chickasaw citizenship court state that there have been instituted in that court two hundred and forty-seven cases, involving the rights of some five or six thousand persons. If, therefore, the hearing of this case is postponed until next October, the allotment proceedings under the recent act of Congress may have to be suspended—a matter not only of inconvenience and expense to the Government, but also of embarrassment to the acknowledged and undisputed members of the tribes.

The Secretary of the Interior, who also desires a speedy settlement of this question, thus writes the Attorney-General:

> The work of making rolls of the citizens of said nations and other work preliminary to the allotment of land in severalty, as prescribed by the acts of June 28, 1898 (30 Stat., 495), and July 1, 1902 (32 Stat., 641), is being vigorously prosecuted and carried toward completion.

The proceeding in question here affects the claims of so large a number of people that it would seem inadvisable, if not unjust, to proceed with work which would be rendered futile by a decision of the Supreme Court upholding the contentions of the petitioner. If this position be correct, then much of the work of this Department must be laid aside until a final determination of the controversy. This will necessarily involve the matter in much confusion and uncertainty, as well as impose upon the Government large additional expense. The importance of this proceeding to the Government and the public generally, as well as to the parties directly interested, would seem to demand a speedy determination thereof, to the end that unnecessary delay in the completion of the rolls of citizenship and division of the lands of these people may be avoided.

For the above reasons, on behalf of the United States and the Choctaw and Chickasaw citizenship court, and with the concurrence of counsel representing the Choctaw and Chickasaw nations, I respectfully move the court to change the return day of the rule to show cause issued herein, so that the case may be heard at the present term.

Notice of this motion has been given to counsel for petitioner.

HENRY M. HOYT,

Solicitor-General.

APRIL 17, 1903.

Supreme Court of the United States.

No. 12, Original.—October Term, 1903.

Ex parte U. S. Joins, Petitioner. } Petition for a writ of prohibition and for certiorari against the Choctaw and Chickasaw Citizenship Court and the Judges and Clerk of the same.

[November 9, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition for a writ of prohibition, and for a writ of certiorari in aid of the same, to the members of the Choctaw and Chickasaw Citizenship Court established by an agreement between the United States and the Choctaw and Chickasaw Nations made on March 21, 1902, and ratified by an act of Congress of July 1, 1902, (32 Stat. 641.) By § 31 of the act the two nations were authorized to file a bill in equity in the said court to annul, on certain grounds of law, decrees of United States courts in the Indian Territory, whereby certain persons were admitted to citizenship in those nations. The bill was filed and a decree was made purporting to annul the former decrees. The prohibition sought is against giving further effect to this decree or certifying and delivering a copy of the same to the Dawes Commission, established under an earlier act, it being alleged that the provisions of § 31 are contrary to the Constitution of the United States.

The facts alleged and not denied may be summed up as follows: By the act of June 10, 1896, c. 398, (29 Stat. 321, 339,) Congress authorized a commission to the Five Civilized Tribes of Indians, commonly called the Dawes Commission, to hear and determine the rights of persons claiming citizenship in any of those nations, with an appeal to the United States courts in the Territory. The petitioner applied to the commission, and, his application being rejected, appealed to the United States court, and there, on March 8, 1898, got a decree in his favor declaring him to be a member of the Chickasaw Nation. A bill of review brought by the Chickasaw Nation is pending in the United States Court of Appeals for the Indian Territory. After the decree, and before the act of 1902, and, for anything to the contrary in the petition, before the decision of this Court next to be mentioned, the petitioner entered a tract of Chickasaw land and made improvements costing fifteen thousand dollars. For this he invokes the act of June 28, 1898, c. 517, § 161, (30 Stat. 495, 505,

507,) and he contends that that act, as well as the act of 1902, § 11, gave him a right of property in common with the other members of the tribe. *Jones* v. *Meehan*, 175 U. S. 1.

On July 1, 1898, an act of Congress granted an appeal from such decrees to this Court, c. 545, (30 Stat. 591,) and an appeal was taken by the Chickasaw Nation. In May, 1899, it was held by this Court that the act was intended to open only the question of the constitutionality of the previous legislation, which was sustained, and that the act of July 1, 1898, was not made invalid by the provision in the earlier statute of 1896 that the judgment of the United States courts on appeal to them should be final. *Stephens* v. *Cherokee Nation*, 174 U. S. 445.

The Indian nations, still being dissatisfied, there followed the agreement and the act of 1902 first mentioned in this statement. By § 33 the Choctaw and Chickasaw Citizenship Court was created. By § 32 it was given appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under the above-mentioned act of 1896, admitting persons to citizenship or to enrollment as citizens in any of the said nations. It is admitted that these sections are valid, but it is contended that § 31, upon which the decree rests, is void. By that section it is provided that the Choctaw and Chickasaw Nations may file a bill in the new court to annul all the said judgments or decrees of the United States courts, on the ground that notice should have been given to both nations, whereas it was given only to one, or on the ground that the proceedings should have been confined to a review of the action of the Dawes Commission on the evidence submitted to that commission, and should not have extended to a trial *de novo* of the question of citizenship. The suit was to be confined to a determination of these questions of law. In case the judgment or decrees should be annulled, parties deprived of citizenship were empowered to transfer the proceedings in their cases to the Citizenship Court for such proceedings as ought to have been had in the United States courts. Several thousand persons being concerned, ten persons admitted to citizenship were to be made defendants and served with process, and there was to be a general notice, also, by publication, with liberty to any person so situated to become a party. A bill was filed, and after proceedings in conformity to the statute a decree was rendered annulling all the said judgments or decrees on both the above grounds.

The answer set up that the test case provided for had been decided and judgment entered and certified to the Dawes Commission on January 15, 1903, before the present petition was filed, and that nothing remained to be done by the Citizenship Court. It also alleged as an estoppel that, since filing this petition, this petitioner has instituted a suit by way of appeal, as provided in the act of 1902, to have his rights tried by the court on their merits, and further, that if the petitioner is an Indian he is bound by

the vote of his tribe ratifying the agreement sanctioned by said act of 1902. To this answer the petitioner demurred, so that, whether a demurrer was necessary or not, the allegations of the answer are not denied.

On these facts the petitioner contends that § 31 is void because it provides for a personal judgment, the annulling of the decree obtained by him, without personal service, because Congress has no power to annul or to provide for the annulling of a judgment of a court of competent jurisdiction not alleged to have been obtained by fraud, and because the annulling of the judgment deprives the petitioner of property rights without due process of law.

It is unnecessary to state the objections to the law more in detail, because we are of opinion that the writ must be denied irrespective of these questions. We need not consider whether the jurisdiction of this Court to grant a writ of prohibition to the District Courts is confined to cases where those courts are "proceeding as courts of admiralty and maritime jurisdiction," Rev. Stat. § 688. *Ex parte The City Bank of New Orleans*, 3 How. 292, 322; *Ex parte Gordon*, 1 Black, 503; *Ex parte Graham*, 10 Wall. 541; *Ex parte Easton*, 95 U. S. 68. As to the jurisdiction in other cases, whether inherent or under Rev. Stat. § 716, see *Re Rice*, 155 U. S. 396; *In re Huguley Manufacturing Co.*, 184 U. S. 297; *Ex parte Chetwood*, 165 U. S. 443, 462. Again we need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *In re Vidal*, 179 U. S. 126; *Gordon* v. *United States*, 2 Wall. 561; *S. C.* 117 U. S. 697, 702. However these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended before the present application was heard.

It is stated correctly by the answer that the act does not empower the Citizenship Court to do anything in the test case beyond rendering its judgment and certifying the same, as it has done. This being so, there is nothing which this Court could prohibit, even if it were of opinion that the petitioner made out a good case on the merits, which we do not intimate. Therefore the writ must be denied. *United States* v. *Hoffman*, 4 Wall. 158; *In re Denton* v. *Marshall*, 1 H. & C. 654, 660; *State* v. *Stackhouse*, 14 So. Car. 417, 427, 428; *Brooks* v. *Warren*, 5 Utah, 89.

Petition dismissed.

No. , Original.

Ex parte L. L. Blake et al.

This is a petition like that in *Ex parte Joins*, and is governed by the decision in that case.

Motion for leave to file petition denied.